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284
7 Otto 290

Oct. 2. 1877

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. 778.

THE UNITED STATES, EX REL. TALMADGE E. BROWN,
PLAINTIFF IN ERROR,

vs.

THE CITY OF MEMPHIS ET AL.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF TENNESSEE.

FILED OCTOBER 2, 1877.

Dec 24 1877
Order
Stay

No. 1874½.

CIRCUIT COURT OF THE UNITED STATES.

(WESTERN DISTRICT OF TENNESSEE.)

THE UNITED STATES EX REL T. E. BROWN
vs.
CITY OF MEMPHIS ET ALS.

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UNITED STATES CIRCUIT COURT

(WESTERN DISTRICT OF TENNESSEE.)

Proceedings had in the Circuit Court of the United States for the Sixth Judicial Circuit thereof, Western District of Tennessee, at a Regular Term of said Court, begun and held for its November Term, A. D. 1875, at the Federal Court-rooms in the City of Memphis, on to-wit: the 2nd day of March, 1876, and days previous thereto, in the following Cause:

UNITED STATES ON THE RELATION OF TALMADGE E. BROWN
vs.
THE CITY OF MEMPHIS AND OTHERS.

No. 1874½ Law Docket.

Writ of Error to Judgment of 2d of March, 1876.

2 **United States Circuit Court,**

(WESTERN DISTRICT OF TENNESSEE.)

Proceedings had in the Circuit Court of the United States for the Sixth Judicial Circuit thereof, Western District of Tennessee, at a Regular Term of said Court, begun and held for its November Term, A.D. 1874, at the Federal Court Rooms in the City of Memphis, on to-wit: the 12th day of March, 1875, and days subsequent thereto, in the following Cause:

TALMADGE E. BROWN
vs.
CITY OF MEMPHIS.

THE CITY OF MEMPHIS
vs.
TALMADGE E. BROWN.

147 Eq. Docket.

AND

TALMADGE E. BROWN
vs.
THE CITY OF MEMPHIS.

Cross Bill.

Now comes the said Talmadge E. Brown, plaintiff in the cross bill in this case, in person, and on the 12th day of March, A.D., 1875, files in
3 open Court the mandate of the Supreme Court of the United States in this cause, and the same is ordered by the Court to be spread upon the Record of this Court in the words and figures following, to-wit:

"MANDATE SUPREME COURT UNITED STATES," UNITED STATES OF AMERICA,

THE PRESIDENT OF THE UNITED STATES OF AMERICA.

To the Honorable the Judges of the Circuit Court of the United States for the Western District of Tennessee—Greeting:

Whereas, lately in the Circuit Court of the United States, for the Western District of Tennessee, before you or some of you, in a cause between the City of Memphis, complainant, and Talmadge E. Brown, surviving partner of the late firm of T. E. Brown & Co., defendant in bill, and Talmadge E. Brown, surviving partner of the late firm of T. E. Brown & Co., complainant, and the City of Memphis (defendant) in the cross bill,

4 wherein the decree of the said Circuit Court entered in said cause is in the following words, viz:

In this cause, at a prior day of this term, the Court having delivered an opinion upon the matters involved herein, after the argument thereof by counsel and the submission thereof to the Court at a prior term of this Court, the cause came on to be further heard at this term upon exceptions to the Master's report, and upon the proof on file, and it appears to the Court that the exceptions to the report are not well taken, the same are hereby severally overruled, and the report of the Master is confirmed except as to the item of one hundred and fifteen thousand, two hundred and sixteen dollars ($115,216) damages, suffered by failure to provide a sinking fund; and as to the said item the Court, on application of the City of Memphis, allowed further proof to be taken, and under such permission the

5 depositions of I. B. Kirtland, William M. Farrington, H. E. Garth, J. J. Freeman, L. Levy, J. J. Murphy and F. H. Cossitt, on the part of the City of Memphis, and of F. S. Davis, W. W. Thatcher, E. D. Cobb, T. R. Farnsworth, B. Richards, W. C. McClure, N. B. Forrest, J. W. Page, jr., John Ainslie and E. M. Apperson, on the part of Talmadge E. Brown, now taken and filed and the cause coming on for further consideration on such testimony, and the further consideration of the other testimony in the case, and the said report, and was argued by counsel, and thereupon, upon consideration thereof, it was ordered adjudged and decreed as follows, viz: That the said sum of one hundred and fifteen thousand two hundred and sixteen dollars in said report be not allowed, but that instead thereof there be allowed the sum of eighty-nine thousand eight hundred and eight dollars, and as so modified, said report stands confirmed.

6 And further that the relief prayed in the bill of complaint of the City of Memphis as to all matters not embraced in the accounting before the Master and determined in the confirmation thereof; and that Talmadge E. Brown ought to have and receive of and from the City of Memphis, under the cross bill herein, the sum of four hundred and seventy-one thousand and sixteen dollars and sixty-four cents, being the balance found due by the Master's report, as hereby modified, together with interest thereon from the first day of August, 1871, the date of the Master's report, to-wit: the sum of seventeen thousand and nine hundred and seventy-seven dollars and eight cents, making a total principal and interest of four hundred and eighty thousand nine hundred and ninety-three dollars, which sum of money the City of Memphis ought forthwith to pay to said Talmadge E. Brown; and further, that said Talmadge E. Brown have and recover of and from the City of Memphis the said sum of four hundred and eighty-eight thousand nine hundred and ninety-three dollars, ($488,993), with

7 his costs to be taxed by the clerk, and this judgment and decree shall bear interest at six per cent. per annum; and further, that there

shall be taxed in the costs against the City of Memphis for A. S. Mitchell, Esq., the Master herein, the sum of fourteen hundred and twenty dollars; and further, that execution shall issue for the enforcement of this decree and judgment, as upon judgments at law, as by inspection of the transcript of the record of the said Circuit Court which was brought into the Supreme Court of the United States by virtue of an appeal taken by the City of Memphis agreeably to the act of Congress in such case made and provided fully and at large appears.

8 And whereas, at the present term of October, in the year of our Lord one thousand eight hundred and seventy-three, the said cause came on to be heard before the said Supreme Court on the said transcript of record and was argued by counsel.

On consideration whereof it is now here ordered, adjudged and decreed by this Court that the decree of the said Circuit Court in this cause be and the same is hereby reversed with costs, and that the said City of Memphis recover against the said Talmadge E. Brown five hundred and sixty-eight dollars and eighty-seven cents for its costs herein expended, and have execution therefor.

And it is further ordered that this cause be and the same is hereby remanded to the said Circuit Court with directions to enter a decree in conformity with the opinion of this Court, 6th April, 1874. You therefore are hereby commanded that such execution and further proceedings be

9 had in said cause in conformity to the opinion and decree of this Court as according to right and justice and the laws of the United States ought to be had, the said appeal notwithstanding. Witness the Honorable Morrison R. Waite, Chief Justice of said Supreme Court, the eighth day of March, in the year of our Lord one thousand and eight hundred and seventy-five.

COSTS OF THE CITY OF MEMPHIS.

Clerk, ...	$548.87
Attorney, ...	20.00
	$568.87

Taxed by D. W. Middleton, Clerk Supreme Court United States.

Endorsed—No. 226, October Term, 1873.

Mandate Supreme Court United States—Memphis vs. Brown—Filed March 12, 1875. H. E. ANDREWS, *Clerk*.

10 **United States Circuit Court,**

(WESTERN DISTRICT OF TENNESSEE.)

Proceedings had in the Circuit Court of the United States for the Sixth Judicial Circuit thereof, Western District of Tennessee, at a Regular Term of said Court, begun and held for its November Term, A. D. 1874, at the Federal Court Rooms in the City of Memphis, on to-wit: the 16th day of March, 1875, and days subsequent thereto, in the following Cause:

TALMADGE E. BROWN
vs.
CITY OF MEMPHIS. } Bill and Cross Bill.

In this cause the city of Memphis appears by its acting attorney, G. A.

Hanson, Esq., and Talmadge E. Brown by his attorney, S. Sibley, Esq.; and the cause is brought on for final decree in accordance with the mandate, judgment and opinion of the Supreme Court of the United States in this cause rendered at the October term thereof A. D. 1873, whereby the decree of this Court hereinbefore rendered on the 13th day of March, A. D. 1872, was declared in all things correct except as to the three
11 items, part of the amount of such decree and aggregating the sum of one hundred and twenty-four thousand eight hundred and eight dollars ($124,808), which items were disallowed by said Supreme Court and to discharge the decree of this Court thereof. The same was reversed and remanded to this Court for these further proceedings; and it now further appearing that the city of Memphis has, since the rendition of the decree, paid to said Brown thereon the sum of one hundred and thirty thousand two hundred and ninety-two dollars and sixty-nine cents ($130,292.69) in divers partial payments, and that there yet remains due from the city of Memphis to Talmadge E. Brown, after deducting said payments, amounting to one hundred and thirty thousand two hundred and ninety-two dollars and sixty-nine cents ($130,292.69), and after striking out the sum of one hundred and twenty-four thousand eight hundred and eight dollars ($124,808) as decreed by the said Supreme Court and all interest thereon allowed in the former decree of this Court, the sum of two hun-
12 dred and ninety-two thousand one hundred and thirty three dollars and forty-seven cents ($292,133.47.)

It is therefore ordered and decreed that the city of Memphis do forthwith pay to said Talmadge E. Brown directly or to the Registry of this Court for him the said sum of two hundred and ninety-two thousand one hundred and thirty-three dollars and forty-seven cents ($292,133.47), together with interest thereon till paid at the rate of six per cent. per annum, and it is ordered and decreed that said Talmadge E. Brown have and recover from the city of Memphis the aforesaid sum of two hundred and ninety-two thousand one hundred and thirty-three dollars and forty-seven cents ($292,133.47), together with the costs of this suit to be taxed, and that this judgment and decree bear interest at the rate of six per cent. per annum till paid as aforesaid, and that execution therefore forthwith issue.

13. ## Petition for Mandamus.

Filed March 22, 1875.

H. E. ANDREWS, CLERK.

THE UNITED STATES ON THE RELATION OF T. E. BROWN vs. THE CITY OF MEMPHIS.	U. S. Circuit Court District West Tennessee.

To the Honorable Judge of Said Court:

Your petitioner represents and shows to the Court that in the year A. D. 1867 the city of Memphis under the provisions of an act of the Legislature of the State of Tennessee contracted with the firm of Taylor, McBean & Co., made up of Abner Taylor, A. G. McBean and Alexander McBean; also contracted with the firm of Forrest, Mitchell & Co. for paving certain of its streets with what is known as the Nicholson pavement, and
14 undertook to charge the cost thereof to the owners of the abutting property, proportioning the same according to the frontage of each lot, and to require that the owners of the same should pay such costs as debts contracted by themselves.

Petitioner further alleges that said parties entered upon this said work under said contracts and completed portions of same; and that subsequently, in the year 1868, the firm of T. E. Brown & Co. (composed of T. E. Brown and J. Langdon) succeeded to all the rights of all of said contracting parties with the city of Memphis, and completed the same fully and to the entire satisfaction of said city, and the same was thereupon accepted by the city.

Petitioner further alleges that the property owners paid a part of the cost of said work, but a great many of them refused to pay, and a large amount being due and unpaid bills were filed for the recovery of the same
15 in the Court of Chancery as contemplated by the said act of the Legislature, and decrees were therein rendered and the cases were taken by appeal to the Supreme Court of Tennessee. Wherein upon final hearing it was decided that the city had no power to make the abutting property owners pay the costs of said work and discharged the said owners from the payment of said liabilities.

And petitioner alleges that he as surviving partner brought suit on said contracts against said city in this Court for the unpaid portions of said work, and that such proceedings were had that a decree was rendered by this Court in his favor against said city on the —— day of March, 1872, for a balance of $488,993 besides costs.

The cause was taken by appeal to the United States Supreme Court, and where the decree of this Court was pronounced correct, except in certain particulars, and the cause was remanded to this Court with instruc-
16 tions to render a decree in favor of petitioner in accordance with the opinion of that Court.

And on the 15th day of March, 1875, in pursuance of the said mandate, a decree was rendered in this Court in favor of said Talmadge E. Brown and against the city of Memphis in the sum of $292,133.47 and the costs of the suit, and that execution issue therefor instanter.

Petitioner alleges an execution has issued on the said decree and has been returned no property found out of which to make said judgments, and the city has no money with which to pay the same and no property out of which it can be made, all of its property being exempt from execution and sale thereunder; and the city has no means with which to pay the said judgment save and except by levying a tax upon all of the taxable
17 persons and property within its limits for this purpose.

Plaintiff alleges that in addition to the city's other powers of taxation the Legislature of the State of Tennessee on the 18th day of March, 1873, by an act then passed enacted, among other things, as follows, to-wit: An act "to amend the charter of all the incorporated towns and cities in the State."

Section 1st. Be it enacted by the General Assembly of the State of Tennessee, That where any incorporated town or city has by virtue of presumed authority to lay special assessments for specific purposes, levied and collected taxes or special assessments, the right to make which levy and assessments was afterwards declared void by the Supreme Court of the State, said town or city shall have the power to levy a tax in addition to all other taxes allowed by law to be levied sufficient to cover the entire costs of the improvements with interest thereon for which said special assessments were illegally made, etc., etc.

And petitioner avers that the debt so due him as appears by the said decree accrued in the manner contemplated by the said act—that is

18 to say, the same was incurred by the city of Memphis as a part of this entire cost of paving portions of the public streets of the city, which paving was done under contracts made in pursuance of ordinances of the city and acts of the Legislature of the State whereby the city undertook and assumed to levy and collect from the property abutting the streets on which the paving was done the costs thereof, and after the said paving was done and accepted as hereinbefore stated and before the said 18th day of March, 1873, the Supreme Court of the State of Tennessee decided that no right or power to make the said levy or assessment existed, and that the attempt to make the same was void. For particularity as to all the matters herein stated the petitioner refers to the records and proceedings in the said cause in which he recovered the said decree, now on file in this Court, and prays the same may be considered as a part of this his petition.

19 Petitioner alleges that he is a citizen of the State of Iowa, and that the respondent is a citizen of the State of Tennessee.

Plaintiff says that notwithstanding said act of the Legislature and the respondent's general power of taxation and the fact that plaintiff has frequently demanded the payment of his said debt and a levy of a tax sufficient in amount to pay his said decree, the city has failed either to pay the same or to levy a tax sufficient for this purpose, and neglects and refuses to do so. Plaintiff alleges that the Hon. John Loague is the Mayor of Memphis, and the following named persons constitute the General Council of the city of Memphis, to-wit:

BOARD OF COUNCILMEN.

	P. J. Kelly,	Charles G. Fisher,
	Herman Caro,	J. S. Carpenter,
	Wm. Hewitt,	L. Solari,
20	S. J. Camp,	J. W. Moores,
	Alf G. Tuther,	J. W. Cochran,
	S. W. Green,	J. D. Danbury,
	H. Luhrman,	L. D. Grant,
	Joseph Clouston, Jr.,	Jacob Moon,
	Richard Doherty,	T. A. Ryan,
	Wm. Gay,	John Zent.

BOARD OF ALDERMEN.

Owen Dwyer,	J. T. Hillsman,
C. W. Metcalf,	A. J. White,
Nick Malatesta,	M. J. Doyle,
H. G. Dent,	G. A. Morti,
I. Happek,	S. B. Robbins.

In consideration of the premises the petitioner prays that an alternative writ of mandamus issue, returnable on the 26th day of March, 1875, requiring the City of Memphis and its said Mayor and General Council to pay immediately to petitioner the amount due on said decree, including interests and costs, or in default thereof to levy each year for the ensuing years, to-wit: 1875, 1876 and 1877, a tax in addition to all other taxes sufficient in amount, after making due allowance for all delinquencies, insolven-

21 cies and defaults, to realize $125,000 each year, and to pay over the same to said Talmadge E. Brown as fast as collected, or so much thereof as may be necessary for the purpose of satisfying this decree, or show cause to the contrary; and for such further, other and different order in the premises as to this Honorable Court may seem fit and proper, and your petitioner will ever pray, &c.

T. E. BROWN, *in person.*

SHELBY COUNTY, } ss.
STATE OF TENNESSEE, }

T. E. Brown, the relator in the foregoing entitled action, being duly sworn before me the nndersigned, deposes and says that the allegations in this petiton are true as he verily believes. T. E BROWN.

Subscribed and sworn to before me this 22d day of March, 1875.

LEONARD H. PILLSBURY, *U. S. Com. D. W. T.*

22 ORDER FOR ALTERNATIVE WRIT.

In consideration of the petition which is now filed the clerk will issue the Alternative Writ of Mandamus as prayed for in the foregoing petition, returnable on the 26th day of March, 1875, at 10 o'clock, A. M.

March 22d, 1875.

No. 1874½—Talmadge E. Brown vs. City of Memphis, et. als.

Writ of Mandamus issued March 22, 1875. Returned and filed June 1st, 1875.

UNITED STATES OF AMERICA, }
DISTRICT OF WEST TENNESSEE. }

The President of the United States to the City of Memphis, John Loague, Mayor, Owen Dwyer, C. W. Metcalf, Nick Malatesta, H. G. Dent, I. Happek, J. T. Hillsman, A. J. White, M. J. Doyle, G. A. Morti and
23 S. B. Robbins, constituting the Board of Aldermen,

And P. J. Kelly, Herman Caro, William Hewitt, S. J. Camp, Alf. G. Tuther, S. W. Green, H. Lunrman, Jos. Clouston, jr., Richard Doherty, Wm. Gay, Charles G. Fisher, J. S. Carpenter, L. Solari, J. W. Moores, J. W. Cochran, J. D. Danbury, L. D. Grant, Jacob Moon, T. A. Ryan and John Zent, constituting the Common Council of the City of Memphis, together composing the General Council of the said city—Greeting:

Whereas, by a petition duly sworn to, filed in Court here, it appears that on the 16th of March, 1875, Talmadge E. Brown recovered in this Court on the equity side of the city of Memphis the sum of two hundred and ninety-two thousand one hundred and thirty-three dollars and forty-seven cents ($292,133.47) and the costs of the suit, and that execution was ordered forthwith to issue therefor, and that the said execution has been duly issued and has been returned with the return of the Marshal in-
24 dorsed thereon: "after dilligent search no property to be found, returned without being further satisfied, by order of attorney for plaintiff."

And it appearing that the said city has no money with which to pay the said decree, and no property out of which it can be made, and has no means of paying the said decree except by levying a tax upon all taxable persons and property within the city, and that the debt for which the said decree was so pronounced accrued and became due from the city of Memphis as a part of the entire cost of paving portions of the public streets of the city, which paving was done under contracts made by the city in pursuance of ordinances of the city and acts of the Legislature of the State of Tennessee, whereby the city undertook and assumed to levy and collect from the property abutting the streets in which the paving was done, the costs
25 thereof, apportioning the same according to the frontage of the property on the streets paved; and after the said paving was done and accepted, and portions of the assessments levied for the payment of the cost thereof had been collected, and whilst a large balance of the cost thereof remained due and unpaid and before the 18th day of March, 1873,

the Supreme Court of the State of Tennessee decided that no right or power to make the said levy or assessment to pay for the said costs of the said pavement existed by law and that the attempt to do so was void, and that by the act of the Legislature of the State of Tennessee, passed on the 18th day of March, 1873, entitled an act to amend the charters of all the incorporated towns and cities in the State, as well as by other laws, full power and authority is given to the General Council of the city of Memphis to levy and collect a tax in addition to all other taxes authorized by law to be levied and sufficient in amount for the sole and exclusive purpose of paying
26 the entire cost of the said pavement so laid down, including the amount of the said decree; and that the city of Memphis and its general council, though often requested so to do, has wholly failed to levy the tax to pay the said decree or any part thereof, or otherwise to pay the same.

Now therefore this is to command you, the city of Memphis, and you the said Mayor, and you the said members of the Boards of Aldermen and Common Council and General Council, that you pay immediately in accordance with a decree of this Court entered herein on the 16th day of March, 1875, the amount of the decree aforesaid and the interest thereon and the costs of the suit, and in default thereof that you proceed to levy and collect each year for the ensuing three years, to-wit: 1875, 1876, 1877 respectively, a tax in addition to all other taxes sufficient in amount after making due allowance for all delinquencies, insolvencies and defaults
27 to realize one hundred and twenty-five thousand dollars ($125,000) each year, and to pay over the same in accordance with the decree of this Court entered herein March 16th, 1875, as fast as collected, or so much thereof as may be necessary for the purpose of satisfying the said decree, including the interest thereon and the costs, or appear in Court here at 10 o'clock a.m. on Friday, the 26th day of March, 1875, and show cause, if any you have, why you should not be required by the judgment of this Court to do so.

And this you shall in nowise omit, and do you then and there make due return of this writ.

Witness: Hon. MORRISON R. WAITE,
Chief Justice of the United States.,
And the seal of the Circuit Court aforesaid and the signature of the Clerk this 22d day of March, 1875.

A true copy. [Signed] H. E. ANDREWS, *Clk.*

L. B. EATON, *United States Marshal.*

28 Executed by delivering the original writ, of which this is a true copy, to his honor John Loague, the Mayor of the city of Memphis, and by making known the contents and delivering a copy of the original writ hereof to Owen Dwyer, C. W. Metcalf, H. G. Dent, I. Happek, J. T. Hillsman, A. J. White, M. J. Doyle, G. A. Morti and S. B. Robbins, members of the Board of Aldermen of the city of Memphis, and in like manner to P. J. Kelly, Herman Caro, Wm. Hewitt, S. J. Camp, Alf G. Tuther, S. W. Green, H. Luhrman, Jos. Clouston, Jr., Richard Doherty, Wm. Gay, Chas. G. Fisher, L. Solari, J. W. Moores, J. W. Cochran, J. D. Danbury, L. D. Grant, Jacob Moon, T. A. Ryan and John Zent, members of the Common Council of the city of Memphis, all on March 24th, 1875. After diligent search Nick Malatesta, Alderman, and J. L.

Carpenter, Councilman, not being found, I executed this writ upon them by leaving copies hereof at the last place of residence of each of
29 the last two on March 25th, 1875.

L. B. EATON, *U. S. M.*
W. KOCK, *Deputy.*

Answer of City filed March 26th, 1875.

TALMADGE E. BROWN
vs.
THE CITY OF MEMPHIS, JOHN LOAGUE, MAYOR, OWEN DWYER et al, COMPOSING THE GENERAL COUNCIL.

Now comes John Loague, Mayor, Owen Dwyer, C. W. Metcalf, Nick Malatesta, H. G. Dent, I. Happek, J. T. Hillsman, A. J. White, M. J. Doyle, G. A. Morti and S. B. Robbins, of the Board of Aldermen, and P. J. Kelly, Herman Caro, Wm. Hewitt, S. J. Camp, Alf G. Tuther, S. W. Green, H. Luhrman, Jos. Clouston, Jr., Richard Doherty, Wm. Gay, Chas. G. Fisher, J. S. Carpenter, L. Solari, J. W. Moores, J. W. Cochran, J. D. Danbury, L. D. Grant, Jacob Moon, T. A. Ryan, and John Zent, of the Board of Councilmen, and altogether composing the General Council of the city of Memphis, and make return to the writ of man-
30 damus nisi issued out of this honorable Court, and not having obeyed the same they respectfully show the following reasons or causes why they have not done so. First, there is no money in the treasury, and the General Council of the city of Memphis has no power under the charter of said city to levy a greater tax than one per cent., or one dollar on the $100 of taxable property for all the purposes of government, including officers' salaries, police, fire, health and hospital departments, and the other current expenses of the city government, including the repair and improvement of streets, alleys, wharves, etc., etc. They have power to levy other taxes as follows: Two mills per cent. for interest on bonded debt of the city, 2½ mills per cent. for sinking fund to retire the bonds of the city, 1 mill per cent. for school and ½ mill per cent. for judgments. But the last named special taxes are required by law to be strictly applied for the purposes for which they are allowed to be
31 levied, and therefore they could not be applied to relator's claims. It is also made a misdemeanor for the respondents to apply said funds for any other than the purposes named by the law.

The one per cent. which the respondents are allowed to levy for general purposes they have already imposed, and therefore have exhausted their powers of taxation.

The act passed by the Legislature of Tennessee March 18, 1873, has since been repealed, and is not now the law of the State.

Respondents cannot now give the date of the act referred to in relator's petition, but it was passed at the present term of the Legislature, though not yet published.

Second, That the writ commands these respondents to levy a sum sufficient to raise $125,000 each year for three years, to-wit: the years 1875, 1876 and 1877, after making due allowances for all delinquencies, insolvencies and defaults, when in fact and in law the property of one
32 citizen cannot be taxed for the delinquency of any other citizen, and furthermore the decree in relator's favor is only $292,133.47, and the sum commanded by the writ to be raised is $375,000, or an excess of $83,133.47.

Third, By a mandate of this Court issued the —— day of June, 1873, the General Council of the city of Memphis levied a tax of 7 mills per cent. for the year 1873, and a tax of 3 mills per cent. for the year 1874 in favor of relator, and there is an uncollected balance on said levies of $170,000, all of which is on account of the relator's decree or claim now sought to be enforced, and which is being collected and paid over to him as fast as possible. There has been collected and paid over to him from said levies about $132,742.69, all on account of his said claim, and if respondents are required now to relevy the same burdensome tax on those who have paid it will be doing a great injury to the prompt taxpayer, and
33 will operate as an inducement to taxpayers to resist the payment of the tax.

Fourth, By the provisions of the law governing the city of Memphis there are certain wards, to-wit: the 9th and 10th wards, generally denominated as the new limits, which are exempted from the payment of any tax to pay for certain indebtedness of the city, and the writ does not show whether the indebtedness is one of the excepted classes or not, and the determination of this question is a judicial one which respondents cannot safely decide for themselves and should be determined upon the face of the writ.

Wherefore the respondents say they have not obeyed the writ, and they pray judgment whether they can do so upon the facts above stated.

G. A. HANSON, *City Att'y.*

34 Fifth, When the contract was made for the laying of said pavements by which the aforesaid debts became due to the relator, it was understood and stipulated that the owners of abutting property should pay for the pavement in front of each lot. And many persons paid for such pavement according to the terms of the contract, and when the act recited in relator's petition of March 18th, 1873, was passed it provided that such persons as had paid for the pavement and held receipts therefor might be excused or released from paying the tax levied to pay for such pavement. Wherefore respondents say they cannot levy and collect from all persons subject to pay taxes the tax as commanded by the writ, and therefore they cannot obey the writ.

Wherefore they pray judgment, etc.

G. A. HANSON, *City Attorney.*

John Loague, Mayor, makes oath that the foregoing return is true to the best of his knowledge and belief.

35 JOHN LOAGUE, *Mayor.*

Subscribed and sworn to before me this 26th day of March, 1875.

[Seal.] JAMES REILLY, *Clerk.*
By C. REILLY, *Deputy.*

Filed March 26th, 1875. H. E. ANDREWS, *Clerk.*

Indorsed as follows: 1874½, T. E. Brown vs. City of Memphis, John Loague et al. Filed March 26th, 1875. H. E. ANDREWS, *Clerk.*
L. H. PILLSBURY, *D. C.*

"Answer of City."

36 DEMURRER

Filed March 26th, 1875, in the Circuit Court of the United States, District of West Tennessee:

THE UNITED STATES ON THE RELATION OF T. E. BROWN
vs.
THE CITY OF MEMPHIS AND OTHERS.

The petitioner demurs to the return herein filed, because—

1st. It presents no sufficient ground for the refusal by the defendants to do what the alternative writ of mandamus requires them to do.

2d. The act of the 18th of March, 1873, gave full power to levy the tax to pay the plaintiff's decree, and the Legislature if it has attempted to do so had no power to repeal the act so as to defeat the plaintiff's right
37 to require the levy of the tax.

3d. The Court cannot, in ordering a levy of taxes to pay the decree, consider past levies which have not been collected and may never be.

4th. As a matter of fact the debt due the plaintiff has accrued since the act of 1867; at any rate the defendants do not show it accrued before, and the constitution and law require all taxes to be equal and uniform, and that no one species of property shall be taxed higher or lower than other property of equal value and prevent the exemption of any property from taxation, and the action of March, 1873, makes no discrimination in favor of any person or class of persons.

5th. The constitution and the law require that taxes be levied upon the principles stated in the last paragraph and hence no account can be taken of the fact that some of those upon whom special assessments were laid to pay for the cost of the pavements laid down paid the assessments
38 levied upon them—the said special assessments were paid voluntarily and without lawful authority and constitute no defense to a lawful levy of taxes to pay the said decree. If the parties who have so paid have any equities they are against the city under the said act of 18th of March, 1873, and they are not against the petitioner.

T. E. BROWN, *in person.*

39 **United States Circuit Court,**

(WESTERN DISTRICT OF TENNESSEE.)

Proceedings had in the Circuit Court of the United States for the Sixth Judicial Circuit thereof, Western District of Tennessee, at a Regular Term of said Court, begun and held for its November Term, A. D. 1874, at the Federal Court Rooms in the City of Memphis, on to-wit: the 30th day of March, 1875, and days subsequent thereto, in the following Cause:

UNITED STATES ex. rel.
TALMADGE E. BROWN
vs.
THE CITY OF MEMPHIS.

The City of Memphis, John Loague, Mayor, S. B. Robbins, Owen Dwyer, C. W. Metcalf, Nick Malatesta, H. G. Dent, I. Happek, J. T. Hillsman, A. J. White, M. J. Doyle and G. A. Morti, constituting the Board of Aldermen, and John Zent, P. J. Kelly, Herman Caro, William Hewitt, S. J. Camp, Alf. G. Tuther, S. W. Green, H. Luhrman, Joseph Clouston, jr., Richard Doherty, William Gay, Charles G. Fisher,

J. S. Carpenter, L. Solari, J. W. Moores, J. W. Cochran, J. D. Danbury, L. D. Grant, Jacob Moon and T. A. Ryan, constituting the Common Council of the said city of Memphis, and together comprising the
40 General Council of said city.

This cause was this day heard upon the demurrer of the plaintiff to the return of the defendants to the alternative writ of mandamus herein issued, and it appearing to the Court that the said return presents no good cause for not complying with the requirements of the said alternative writ and that the said demurrer is well taken, it is ordered that the same be sustained and the said defendants saying nothing more in bar or preclusion of the remedy sought by the plaintiff, and it appearing to the Court that on the 16th day of March, 1875, the said Talmadge E. Brown recovered on the equity side of the Court here of the city of Memphis the sum of two hundred and ninety-two thousand one hundred and thirty-three dollars and forty-seven cents (292,133.47) and the cost of the suit, and that an execution has been issued on the said decree and has been returned, with the return of the Marshal thereon indorsed, to the effect that the city of Memphis has no property whereon to levy and that the execution is returned wholly unsatisfied; and it further appearing that the said city has no
41 money with which to pay the said decree and no property out of which it can be made, and no means of paying the said decree except by levying a tax especially for that purpose, and that it possesses the power to levy and collect such a tax, and that though often requested so to do, the city of Memphis had wholly failed to pay the said decree or to levy or collect a tax for the purpose of paying the same. It is therefore considered, ordered and adjudged that the alternative writ of mandamus be made peremptory and final, and that the city of Memphis and its General Council proceed each year for the ensuing three (3) years, to-wit: 1875, 1876, 1877, respectively, at the same time, and in the same manner that other city taxes are assessed and levied and collected, to assess, levy and collect upon all the property within the city taxable by law a tax in addition to all other taxes allowed by law, payable in the lawful money of the United States of America, sufficient in amount, after making due allowance for all delinquencies, insolvencies and defaults, to realize one hundred and twenty-five thou-
42 sand dollars ($125,000) each year for the years 1875, 1876, respectively, and so much of the said sum for the remaining year, to-wit: 1877, as may be required or necessary to pay and satisfy the balance of the said decree, including costs and interest not satisfied by the taxes collected and paid over during the two preceding years, and to pay over the same as fast as, and from time to time, as the same may be collected directly to the said Talmadge E. Brown, or into Court here, to be forthwith paid him without the further order of the Court until the whole amount of the said decree, including the costs of the suit and the interest that has accrued or may accrue thereon, be paid and discharged.

It is further ordered that the clerk of this Court, whenever the said Talmadge E. Brown shall request the same, issue each year, during the said years 1875, 1876 and 1877, respectively, a peremptory writ of mandamus in accordance with the foregoing judgment to be served on the city of Memphis and its Mayor and General Council in the manner prescribed by law, and it is ordered that the plaintiff recover of the defendant, the city of Memphis, the costs herein expended, and that execution issue therefor.

43 **United States Circuit Court,**

(WESTERN DISTRICT OF TENNESSEE.)

Proceedings had in the Circuit Court of the United States for the Sixth Judicial Circuit thereof, Western District of Tennessee, at a Regular Term of said Court, begun and held for its May Term, A. D. 1875, at the Federal Court Rooms in the City of Memphis, on to-wit: the 24th day of June, 1875, and days subsequent thereto, in the following Cause:

T. E. BROWN
versus
THE CITY OF MEMPHIS. } 147 Equity, and Law 1874½.

In the above cause it appearing to the Court that the city of Memphis having levied a special tax under the mandate of the Court is collecting and paying to the plaintiff or his agents the funds arising therefrom without having paid the costs of said cause. It is therefore, on motion, ordered that the mandate herein be so modified as to command the said city by its proper officers to pay the costs of these causes, amounting to the sum of fourteen hundred and twenty dollars and forty-eight cents, ($1,420.48) out of any funds now on hand or from the first that may hereafter be re-
44 ceived from such collection, and that a certified copy of this order be served upon said city of Memphis.

45 MANDAMUS.

Returned and Filed Sept. 30th, 1875.

UNITED STATES OF AMERICA,
DISTRICT OF WEST TENNESSEE.

The President of the United States to the City of Memphis, John Loague, Mayor, Owen Dwyer, C. W. Metcalf, Nick Malatesta, H. G. Dent, I. Happek, J. T. Hillsman, A. J. White, M. J. Doyle, G. A. Morti and S. B. Robbins, constituting the Board of Aldermen,

And P. J. Kelly, Herman Caro, William Hewitt, S. J. Camp, Alf. G. Tuther, S. W. Green, H. Luhrman, Jos. Clouston, jr., Richard Doherty, Wm. Gay, Charles G. Fisher, J. S. Carpenter, L. Solari, J. W. Moores, J. W. Cochran, J. D. Danbury, L. D. Grant, Jacob Moon, T. A. Ryan and John Zent, constituting the Common Council of the City of Memphis, and together composing the General Council of the said city—Greeting:

Whereas, it appears that on the 30th day of March, A. D., 1875, in this the Circuit Court of the United States for said District of West Tennessee, the cause of T. E. Brown vs. the City of Memphis came on to be
46 heard on the demurrer of the plaintiff to the return of the defendants to the alternative writ of mandamus herein issued. And it appearing to the Court that the said return presented no good cause for not complying with the requirements of the said alternative writ—and that the said demurer is well taken. It was ordered that the demurrer be sustained, and the said defendants saying nothing further in bar or preclusion of the remedy sought by the plaintiff, and it appearing to the Court that on the 16th day of March, A. D., 1875, the said Talmadge E. Brown recovered on the equity side of this Court here, of the city of Memphis, the sum of two hundred and ninety-two thousand one hundred and thirty-three 47-100 dollars and the costs of this suit.

And that an execution has been issued on the said decree, and has been returned with a return of the Marshal indorsed thereon, to the effect that the city of Memphis has no property whereon to levy and that the execution is returned wholly unsatisfied, and it further appearing that the said city has no money wherewith to pay the said decree and no property out of which it can be made, and no means of paying the said decree ex-
47 cept by levying a tax specially for that purpose, and that it possesses the power to levy and collect such a tax, and that though often requested so to do, the city of Memphis has wholly failed so to pay said decree, or to levy or collect a tax for the purpose of paying the same. It was therefore considered, ordered and adjudged that the alternative writ of mandamus be made peremptory and final, and that the city of Memphis and its General Council proceed each year for the ensuing three (3) years, to-wit: 1875, 1876, 1877, respectively, at the same time and in the same manner as the other city taxes are assessed, levied and collected, to assess, levy and collect upon all the property within the city taxable by law, a tax in addition to all other taxes allowed by law, payable in lawful money of the United States of America, sufficient in amount, after making due allowance for all delinquencies, insolvencies and defaults, to realize one hundred and twenty-five thousand dollars ($125,000) each year for the years 1875, 1876, respectively, and as much of said sum for the remaining year, to-wit: 1877, as may be required or necessary to pay and satisfy the balance of the
48 said decree, including interest and costs not satisfied by the taxes collected and paid over during the two preceding years, and to pay over the same as fast as, and from time to time, as the same may be collected, directly to the said Talmadge E. Brown, or into Court here, to be forthwith paid him without further order of the Court, until the whole amount of the said decree, including the costs of the suit and the interest that has accrued or may accrue thereon, be paid and discharged.

Now therefore, this is to command you, the said city of Memphis, and you, the said Mayor, and you, the said members of the Board, Aldermen and Common Council and General Council, that in accordance with the said decree you proceed to assess, levy and collect a tax upon all the taxable property of the city of Memphis, in addition to all other taxes allowed by law, sufficient in amount, after making due allowance for delinquencies, insolvencies and defaults, to realize one hundred and twenty-five thousand dollars, ($125,000), and pay over the same in accordance with the above recited decrees of this Court, and that you make due return of this writ on the 4th Monday of November next.

Witness the Hon. MORRISON R. WAITE, Chief Justice
[SEAL.] of the Supreme Court of the United States, and
49 the seal of the said Circuit Court this 28th day of June, A. D., 1875.

[L. S.]

H. E. ANDREWS, *Clerk.*
L. H. PILLSBURY, *D. C.*

RETURN.

"Came to hand June 29, 1875. Executed by reading the original in the presence of the members of the Common Council, and also in the presence of the members of the Board of Aldermen which assembled by the General Council, and by leaving the original, of which this is a true copy, with Hon. John Loague, Mayor, &c., on the 29th day of June, 1875.

"L. B. EATON, *U. S. M.*
"F. H. TORBITT, *Deputy.*"

Endorsed—Returned and Filed September 30th, 1875.
H. E. ANDREWS, *Clerk.*
L. H. PILLSBURY, *D. C.*

50 RETURN TO MANDAMUS.

Filed Feb. 9th, 1876.

T. E. BROWN & CO.
vs.
THE CITY OF MEMPHIS
AND THE GENERAL COUNCIL THEREOF.

In the Circuit Court of the United States, for the District of West Tennessee:

The city of Memphis and the General Council thereof, by its attorney, comes, and for return to the peremptory writ of mandamus issued out of this Court on the 22d day of March, 1875, it says:

On the 10th day of December, 1875, the General Council of the city of Memphis passed an ordinance, a copy of which is hereto appended, marked Exhibit "A." and prayed to be taken as part of this return. Respondent further states that it is proceeding, and will proceed, to collect said tax and apply the same as required by said writ, as rapidly as possible and by all the means that the laws of the State afford for that purpose. Respondent further states as a reason why it did not sooner proceed to levy and collect the tax as required by said writ: that on the 20th day of March, 1875,

51 the Legislature of the State of Tennessee passed an act by which it was required that the assessments of "real and personal property" of such city (meaning the city of Memphis) "by the State or County Tax Assessor" for State and County "purposes shall (should) be the "assessment for city purposes."

Said act took effect from the date of its passage and respondent was compelled thereby to await the assessment for State and county purposes before it could proceed to levy any tax for city purposes.

On the 7th day of December, 1875, a duly authenticated copy of the assessment for State and county purposes and also the necessary books to enable the City Tax Collector to proceed with the collection of taxes for city purposes were delivered to said Tax Collector.

Thereafter, to-wit: on the said 10th day of December, 1875, respondent by its General Council did levy the tax and is now proceeding to collect the same as required by said writ.

2. Respondent in order to evoke the judgment of this honorable Court for its own guidance in the matter of levying this tax, and in order that it may understand its powers and duties in the premises, further states and shows:

52 By an act of the Legislature of the State of Tennessee passed on the 3d day of December, 1867, and printed on pages 65 and 66 of the published acts of said Legislature for the years 1867 and 1868 (to which reference is here made) certain new territory was added to the corporate limits of the city of Memphis and designated as the 9th and 10th wards of said city.

By an act of said Legislature passed on the 1st day of December, 1869, it was enacted that "the people residing within the limits of the addition "made to the city of Memphis by the acts of 1867 (meaning the act above "referred to) shall not be taxed to pay any part of the debt of the city or "interest thereon contracted prior to the passage of said act of 1867."

In the months of March and July, 1867, the city of Memphis entered into contracts with Messrs. Forrest, Mitchell & Co. and Taylor, McBean

& Co., by which the latter undertook to pave certain streets of the city with what is known as the "Nicholson pavement."

Respondent appends a copy of one of said contracts, marked Exhibit B., and prayed to be taken as part of this petition.

The other contracts, in all respects material to this question, were similar to the one exhibited. Under these contracts many of the streets
53 of the city were paved with the Nicholson pavement. Some portion of said paving was done before, but much the greater portion was done after, the passage of said act of December, 1867. Respondent cannot now state the exact proportion of paving done before and after the passage of said act.

Respondent further states that the original paving contracts made with Forrest, Mitchell & Co. and Taylor, McBean & Co. were on the 2d day of June, 1868, transferred to T. E. Brown & Co. Said transfer was made by consent of the city of Memphis, and T. E. Brown & Co. were required to give, and did give bond to the city conditioned for the faithful performance of the work of paving according to the terms of the contract.

Respondent appends hereto a copy of the proceedings of the Board of Mayor and Aldermen of said city in reference to said transfer, marked Exhibit "C.," and prayed to be taken as part of this return.

Upon this state of facts respondent submits to the Court the questions—

1. Was the debt upon which T. E. Brown & Co. recovered their judgment against the city of Memphis, upon which judgment this writ of mandamus was issued, contracted within the meaning of the act of 1869
54 when the paving contracts were executed in March and July, 1867; or was it contracted as each section of the work was completed, and the price thereof payable according to the terms of the contract?

2. If the date of the contract determines when the debt was contracted, did the city enter into a new contract with T. E. Brown & Co. on the —— day of ——, 1868, when the paving contracts were transferred to them?

The judgment in favor of T. E. Brown & Co. upon which this mandamus proceeding is based was recovered for the balance due to them for work done and materials furnished under the paving contracts and the transfer thereof hereinbefore referred to.

Respondent further states that during the entire period from the date of the execution of the first of said paving contracts until the work of paving was completed and ended the charter of the city of Memphis required that at least two-thirds of the taxes upon realty collected from any ward of the city should be expended within that ward; and that no part of the pave-
ments laid under said contract was laid in the territory added to the
55 city by the said act of December, 1867.

Under these facts respondent has been enjoined from levying any tax upon the territory so as above added to the city limits by the courts of the State of Tennessee for the purpose of paying the said judgment recovered by Brown & Co.

And respondent submits to this Court the question of its power and duty in the premises.

Respondent for further answer says that by the terms of said paving contracts the costs of said paving was to be borne by the owners of the lots abutting on the streets to be paved according to the frontage of the lots on said streets, said costs to be paid by a specific assessment on each lot and the owner thereof, one-half to be paid in cash on the completion of each section of the pavement and the other half in 30, 60 and 90 days thereafter in equal installments.

This mode of payment was adopted by the city under an act of the Legislature passed November 24, 1866.

As sections of the pavement were from time to time completed a large number of owners of the lots abutting on said streets paid to the
56 contracters the entire costs of grading, paving, etc., in front of their respective lots.

Other owners of abutting lots refused to pay as required by the act of the Legislature and by the terms of the contracts, and being sued therefor it was finally determined by the Supreme Court of Tennessee that the said act of November 24, 1866, so far as the same authorized the city to compel the owners of the abutting lots to pay the entire costs of paving, grading, etc., in front of their respective lots, was unconstitutional and void, and that the money to pay for said paving must be raised by a general tax.

Soon after the rendition of this judgment T. E. Brown & Co. brought suit against the city for the balance due to them under said paving contracts, and in that suit they recovered against the city the judgment upon which this mandamus proceeding is based.

On the 24th day of March, 1873, by an act of the Legislature the city of Memphis was empowered to levy a tax in addition to all other taxes allowed by law to be levied sufficient to cover the entire costs of said paving, grading, etc., for which said special assessments had been illegally made and collected, and to allow as valid payments on said additional tax any
57 sum or sums with interest paid by persons in satisfaction or in part satisfaction of said special assessments illegally levied and collected as aforesaid.

After the passage of this act the said city of Memphis passed an ordinance by which the Mayor thereof was authorized "to issue to each and "every person or corporation holding the receipt of the contractors or the city "for payments actually made upon bills or accounts certified to be correct "by the City Engineer for or on account of paving the streets and alleys "of the city with the Nicholson or stone pavement, under the provisions "of the city charter and the ordinance of the city charging the costs of "such paving upon the property in front of which the pavement was laid "(which provision of the charter and ordinance have been held by the "Supreme Court of Tennessee to be unconstitutional and void), a certificate "of indebtedness, under seal of the city and countersigned by the Register, "for the amount of money actually paid upon such receipt with interest "thereon at the rate of six per cent. per annum from the date of payment "until said certificate may be redeemed by the city."

58 By another section of the same ordinance it was provided that the "certificates of indebtedness to be issued under this ordinance shall "be received at their face value and interest in payment of any tax that "may hereafter be levied by the city of Memphis to cover the entire costs "of laying the Nicholson and stone pavement."

The city of Memphis accordingly issued a large number of certificates of indebtedness, as provided by said ordinance, and receivable for taxes as therein provided.

A copy of one of said certificates is hereto appended and marked Ex- "D." and prayed to be taken as part of this return.

By a subsequent ordinance the Mayor was authorized to call in and redeem said certificates and in lieu thereof to issue what were denominated change warrants, and a large number of such change warrants were accordingly issued in the form shown by a copy of one of them hereto appended as part of this return, marked Exhibit "E."

A large amount of said certificates and change warrants are still outstanding unredeemed.

On the 20th day of March, 1875, the said act of March 24th,
59 1873, was repealed.

Under this state of facts bills have been filed in the State courts to enjoin the city from levying any tax to pay for the pavements on the property of those who have already paid to the contractors.

And it is also claimed that in payment of any tax levied or to be levied for that purpose, the city must receive the said certificates and change warrants.

Respondent filed herewith a copy of the bill filed against it in the State Courts, as exhibit F. hereto, containing a detailed statement of the facts and legislation on this question, and which, so far as it is a statement of facts and not mere inference of fact, or law is substantially true.

Respondents ask the judgment of this Hon. Court as to their rights and duties in the premises.

Respondents would also refer to the copy of paving contract hereinbefore contained, and would state that the judgment of T. E. Brown & Co. upon which this mandamus is based was recovered upon the guaranty of the city contained in said contract for paving.

Respondents further say that if the property in the territory added
60 to the city by the act of Dec. 1867, and the property of those who paid under special assessment as aforesaid, or of those who held the said certificates of indebtedness or change warrants, he held exempt from any tax to pay this judgment, then the levy made by respondents is insufficient to raise the amount of money required to be raised by this writ of mandamus.

S. P. WALKER, *City Attorney.*

Filed Feb'y 9, 1876. H. E. ANDREWS, *Clerk.*
L. H. PILLSBURY, *D. C.*

Be it resolved, That a special tax of 54 cents on the $100 worth
61 of property be and the same is hereby levied for the 48th Corporate year for the purpose of paying one hundred and twenty-five thousand dollars of the judgment rendered by the United States Circuit Court in favor of T. E. Brown against the city, as required by the writ of mandamus heretofore served upon us.

Adopted by Aldermen and Council December 10, 1875.

Approved Dec. 14th, 1875. JOHN LOAGUE, *Mayor.*

The above is a true copy from the Ordinance Book in my office, this April 23, 1876. CRABTREE BELCHER, *City Register.*

Indorsed—1874½, Circuit Court of the United States, Western District of Tennessee—T. E. Brown vs. City of Memphis.

Exhibit A to Return of the City.

Filed Feb'y 9th, 1876. H. E. ANDREWS, *Clerk.*
By L. H. PILLSBURY, *D. C.*

62 *Exhibit B.*

STREET PAVEMENT, 1867, No. 1.

FORM OF AGREEMENT,

To be executed in duplicate, for regulating and paving with Nicholson pavement the carriage way of Beal street from Shelby street to Wellington street, inclusive. For grading and for laying and relaying curb-stones, etc.

This agreement, made and concluded this sixteenth day of July, in the year of one thousand eight hundred and sixty-seven, by and between the

Mayor and Aldermen of the city of Memphis, County of Shelby, and State of Tennessee, of the first part, and Forrest, Montgomery & Co., composed of N. B. Forrest, J. E. Montgomery, Joseph Mitchell and F. G. McGavock, contractors, of the second part,

Witnesseth: That the said parties of the second part agree, for considerations hereinafter mentioned and contained, and under a penalty
63 expressed in a bond bearing even date with these presents, and hereto annexed, to furnish at their own proper cost and expense, all the necessary material and labor, and in good, firm and substantial manner regulate and pave with Nicholson pavement the carriage way of Beal street, from Shelby st. to DeSoto street, including the intersecting streets and alleys to the line of said Beal street. And to lay and relay curb-stones as required, in the manner and under conditions hereinafter specified; and have further agreed that the Corporation shall be and are hereby authorized to appoint such person or persons as they may deem proper to inspect the materials to be furnished and the work to be done under this agreement, and to see that the same corresponds with the specifications hereinafter set forth, to-wit:

SPECIFICATIONS.

1. All material furnished and all work done which, in the opinion of the appointed agents of the corporation, shall not be in accordance with the specification, shall be immediately removed, and other materials fur-
64 nished, and work done that will be in accordance therewith; and in case of the neglect or the refusal of the contractors to immediately remove improper material, the same to be removed by the corporation at the expense of the contractors, said expenses to be deducted from the account of the contract.

2. The work under this agreement to be prosecuted at and from as many different points in such part or parts of the street on the line of the work as the said agents of the corporation may from time to time, during the progress of the work, determine; and at each of said points an inspector will be placed on the day designated for the commencement of the work thereat. Proper fences and guards are to be erected at night, and a sufficient number of lights kept burning on or near the work from twilight in the evening until sunrise.

The right to construct sewers or to lay or repair gas pipes on the line of the said street, at any time prior to the laying of the pavement, is
65 expressly reserved by the agents of the corporation, and said contractors shall not interfere with or place any impediment in the way of any person or persons who may be engaged on said work; except that the work done under this contract is not to be delayed for the last aforementioned work.

It is understood that all prior contracts for paving will take precedence as to the intersections of streets or alleys, and that the paving under this contract stops at the line of said intersecting streets and alleys, with the exception of Main street.

3. GRADING.—The surface of the street is to be cut to the proper grade and curve as directed by the City Engineer. That portion of the street on which remains three inches or more of gravel, after said cut, is to be graded seven inches below the surface of the pavement, and the surface of the same is to be shaped with three inches in depth of clean gravel or sand entirely free from clay or vegetable matter, and such portion or parts of said
66 street on which there remains less than a uniform bed of gravel, three inches deep, are to be graded ten inches below the top of the pave-

ment when completed, and filled with a uniform bed of gravel or sand not less than three inches. All superfluous earth, gravel or sand from the grading to be removed and placed by the contractor, at his own expense, at such points as may be designated by the improvement committee, not exceeding a distance of five hundred yards from the line of the work.

All brick and stone gutters to be taken up by the contractor, at his own expense, and removed by the Street Commissioner.

4. BALLASTING.—The ballasting hereinbefore referred to is to be clear, uniform in character, containing no pebbles of larger diameter than one inch, and smoothly rounded to the shape of the street, as directed by the Engineer.

67 5. FLOORING.—The entire carriage way from curb to curb to be covered with entire white pine, good heart cedar or cypress boards—not less than one inch in thickness—the ends of the same to rest on stringers of the same material, not less than ten inches wide, placed transversely. All to be properly covered on both sides with pure hot coal tar.

The whole evenly laid to such crown and grade as from time to time may be given by the Engineer.

6. BLOCKS.—Rows of sound, three inch white pine, good heart cedar or cypress blocks, free from sap, loose or decayed knots, or other defects, six inches long, placed on end upon the flooring—the rows running across the street, except at street intersections, at which the blocks are to be placed diagonally at an angle of forty-five degrees, diverging from the point of intersection at the center line of each street. The blocks in every row to break joints in a similar manner as in brick masonry; said blocks to be

68 sawed from 3 inch plank or joist; no blocks to be laid in the pavement less than 5 inches or more than 10 inches wide.

It is expressly understood that the City Engineer or Inspector or other agent of the corporation reserve the right to examine the lumber before it is sawed into blocks, as also the blocks, and to refuse any or all lumber brought in the street for the above purposes, especially if the appearance of the same shows that they have been cut off dead logs; that is to say, logs that have been exposed to the weather for such a length of time before having been sawed as to take the vital strength from the same. Said blocks are to be separated by strips of boards or pickets, said pickets to be of uniform thickness of three-quarters of an inch and of a uniform width of three inches, and not more than four feet long, placed on edge between the rows, and each and every strip or picket to be nailed to the blocks

69 by two ten-penny nails to prevent their working up. The blocks shall be fitted transversely so as to make close joints, and shall be culled and assorted so as not to vary in thickness in each row. Providing any decay, sap or other defect is discovered the same is to be trimmed off and the rows, both of the blocks and of the strips, are to be laid closely together. All the blocks after inspection are to be dipped two-thirds of their depth in hot tar; and it shall be the duty of the inspector to be present at all times during the process of said work and examine every block and to reject all that do not conform strictly with the requirements of this specification.

The spaces or joints between the rows of blocks and above the strips shall be filled with clear screened roofing gravel and a composition of tar equal to the best now used for such purposes, thoroughly mixed and compactly rammed down by means of a paver's rammer and an iron

70 blade prepared to fit the joints, the blade to be $\frac{5}{8}$ in thickness, which blade is to be moved only one-half of its length at a time

while ramming, so that all parts of the same shall be thoroughly rammed, but no rammer shall be applied within 25 feet from the work progressing or not ready to be rammed, the blade not to exceed eighteen inches in length. The gravel shall be applied thoroughly dried and kept heated enough not to chill the tar, and shall be composed of small pebbles of the size from that of peas to that of one-half (½) inch diameter and free from particles or sand which may prevent the tar from penetrating.

All the tar used in the joints shall be so boiled down and thickened that when cool it shall be tough and fibrous without liability to become brittle in cold weather. and shall be equal in quality to that used in all Western cities.

It is hereby expressly understood that there shall be no raw coal tar used in filling the spaces or joints between the blocks on said improvement, but the clear composition above named; said composition to be applied
71 hot, and in such quantities as to fill and penetrate the joints, using for that purpose at least two gallons of composition to every square yard of pavement.

The whole surface shall be thoroughly sprinkled with a mixture of the aforesaid composition and coal tar heated, and immediately covered with roofing gravel and common river sand, mixed in about equal proportion, and not less than three-quarters of an inch thick.

It is expressly understood that the swabbing of the boards under the blocks and the top sprinkling of the pavement is not included in the above enumerated amount of tar. The aforesaid mixture of composition and coal tar for the swabbing and sprinkling shall consist of one-half of each kind, the contractor to submit samples of the tar and composition proposed to be used to the agents of the corporation for approval, and that actually
72 used to be equal in quality to the samples that may be approved.

7. GRADE.—The top of the wooden blocks at the curbstones to be at such distances below the angle of the curb of the sidewalks as may from time to time be determined by the City Engineer; also the slope and depression of the gutters to be determined by the Engineer with reference to the volume of water to be carried.

The crown of each at the point of intersection of the central line of streets to be three inches higher than the crown on the general line of the streets, and the formation of all curves from the gutters or from the curbs to be determined by the Engineer as the work progresses.

The contractor is also to make the proper connection of the gutters of intersecting streets and alleys as directed by the City Engineer without extra charge therefor.

When the pavement terminates on the line of the street to be paved under this contract on intersecting streets or alleys (which are not at
73 present paved) there are to be wooden curbs, four inches thick and fourteen inches wide, composed of the same material as the block, and firmly set in the ground and properly secured to prevent thrusting outward during the process of ramming the pavement.

Where gullies, wells, traps and man-holes are required for the purpose of the means of access to gas pipes along the line of the streets, the same is to be constructed by the Memphis Gas Light Co. without expense to the contractor, except that the contractor is at his own proper expense, to properly fit the pavement around and connecting with the same.

9. CULVERTS.—All culverts that may be required to take water across the street which is to be paved to be constructed of good heart cypress, and of the dimension of the present culverts, the walls to be not less than four

inches in thickness, and the bottom and top to be planked with cy-
74 press planks, three inches thick, except that where it is found practicable, the block pavement will extend over the culvert, as determined by the City Engineer.

The surface of all culverts will be measured as pavement. The stone work in the present culverts to be considered the property of and to be taken up and removed by the corporation or their agents.

All gutters to connect with the culverts as directed by the City Engineer.

10. CURBING.—All new curbings that may be required for sidewalks along the line of the street are to be composed of either good limestone of approved quality or fine grained Ohio river blue freestone, from the "Buena Vista" quarry, to be not less than five inches in thickness and sixteen inches deep, and in length of not less than three or
75 more than eight feet.

The top and eight inches deep of the face and four and one-half inches of the back to be properly hammer dressed, and the outer iris to be rounded with a radius of three-quarters of an inch, the joints to be close to a point not less than two inches below the top of the pavement.

All curbstones at the angles of the pavement, at the intersection of streets and alleys, to be of solid blocks, and those at the intersection of streets to be rounded with a radius of twelve inches. Before furnishing any new curbing the contractor shall submit to the agents of the corporation samples of the stone proposed to be used for approval, and the curbing furnished shall be equal in quality to the samples that shall have been approved.

All of the stone curbing that is now set on the line of the street that is determined to be of proper quality and dimensions, but is not in
76 proper position, as to line of grade is to be reset by the contractor under the direction of the City Engineer.

The curbing is to be properly set on a good foundation properly secured.

Where sidewalk pavements require changes or repairs on account of changes of curbing or the setting of new curb the same is to be done by and at the expense of the abutter.

11. MAN-HOLES.—All man-holes and caps for the public cisterns on the line of the street are to be changed by the contractor, and carried not less than 20 inches outside of the track of the street railroad. The present apertures are to be properly closed with brick masonry and new ones made of the proper diameter, and gulleys with nine inch brick wall built at a proper inclination from the same to the pavement, all laid in cement.

The cistern caps will be furnished by and at the expense of the corporation, but the contractor is to set the same and properly fin-
77 ish the pavement connecting with the same, under the directions of the City Engineer.

The present cistern caps on the line of the work are to be considered the property of and to be taken up and removed by the corporation or their agents.

12. CLEARING UP.—All surplus material, earth, sand and rubbish of all kinds, are to be removed from the line of the work as rapidly as the work progresses, or the work will not be considered completed according to the agreement.

13. All loss or damage arising out of the nature of the work to be done under the contract or agreement, or from any unforeseen obstructions or difficulties which may be encountered in the prosecution of the

same, or from the action of the elements during the prosecution of the work, or from encumbrances on the line of the work, to be sus-
78 tained by the aforesaid contractor.

14. The prosecution of the work to be suspended at such time and for such periods as the corporation or their agents may determine, but if suspended for no fault of the contractor then the corporation to be liable for the suspension in damages to be ascertained by third parties.

15. It is expressly understood that the work is to be prosecuted in sections of not less than the space between two intersecting streets, and that the work of inspection shall apply to the work on each of said sections on the whole line of the work.

16. Whenever the word "contractor" and the words "party of the second part" and pronouns in the place thereof are used in the contract, they are to be considered as referring to and meaning the party
79 or parties, as the case may be, of the second part, to this agreement.

17. And the said party of the second part hereby agrees that the said party of the first part shall be, and they are hereby authorized to retain out of the moneys payable to him under this contract the certain sum of ten cents for each square yard of pavement constructed under this agreement, and to expend the same in the manner hereinafter provided for, in making such repairs to the work done under this agreement as the said corporation or their agents may deem necessary.

And it is further agreed, that if at any time during the six months, from and after the date of the acceptance of this work by the agents of the corporation, the said work or any part or parts thereof, (excepting such part or parts thereof as after the completion of the same may have been disturbed by the construction or repairs of sewers, drains, or in laying or re-
80 pairing gas pipes) shall, in the opinion of the agents of the corporation, require repairs; and the said agent shall notify the said party of the second part to make the repairs so required; the said party of the second part will immediately commence and complete the same to the satisfaction of said agents; and in case of failure or neglect on his part so to do, within three days from the date of the aforesaid notice, that then the said agents shall have the right to purchase such materials as they may deem necessary, and to employ such person or persons as they may deem proper, and to undertake and complete the said repairs, and to pay the expense thereof out of the said certain sum retained for this purpose by the parties of the first part, as before mentioned. And the parties of the first part hereby agree that upon the expiration of the said period of six months, provided that the whole work shall at that time be in good order, which shall be determined by a certificate to that effect, signed by
81 the City Engineer and indorsed by the Mayor, to pay to the said party of the second part the whole or such part of the same last aforesaid as may remain after the expense of making said repairs in the manner aforesaid shall have been paid therefrom.

[A]

The said party of the second part further agrees, that the return of the City Engineer, indorsed by the Mayor, shall be the account by which the amount of work done shall be computed, and that he shall not be entitled to demand or receive payment for any work upon in or about the said work or extra work, unless ordered in writing by the said agents of the corpora-

tion to do the same as extra work, and a price therefor agreed upon previously to its commencement.

The party of the second part agrees, and they hereby authorize the parties of the first part to reserve the right to make any changes in the
82 work to be done under this contract, or in the material used therefor, which they from time to time, during its progress, may deem expedient; and the contractor, upon notice of said changes to be made, is to proceed as directed by said notice, and the value of said changes (either in increasing the cost of the work to be done under this contract, or of the materials employed therefor or diminishing the same) to be estimated in proportion to the contract price of work and materials of the like nature done under this contract, and the value of said changes to be added to the amount to be paid under this contract, or deducted therefrom, as the case may be, and that said changes shall in no way vacate or render void the conditions of this contract.

[B]

The said party of the second part hereby further agrees that he will commence the aforesaid work on or before the second day of Sept. 1867,
83 and at such point or points as said agents of the corporation may designate, and fully complete the same in accordance with this agreement on or before the expiration of the first day of January next, thereafter, Sundays, holidays and such other days on which the prosecution of the whole of the work in accordance with the provisions of this agreement is in consequence of the weather, and as provided in Section 14, necessarily suspended, to be excepted.

Also, that he will give his personal attention to the work, and that he will not sublet the aforesaid work but will keep the same under his personal control, and that he will punctually pay the workmen who shall be employed on said work in cash current.

[C]

And the said party of the second part hereby further agrees that the said parties of the first part shall be and they are hereby authorized to
84 deduct and retain out of the moneys which may be due or become due to the parties of the second part under this agreement, the sum paid to the inspector or inspectors, as wages for each and every day the aggregate time of the inspectors may exceed the time hereinbefore stipulated for the completion of the whole work under this agreement.

[D]

The said party of the second part further agrees that if at any time the said agents of the corporation shall be of the opinion, and shall so certify in writing, that the said work or any part thereof is unnecessarily delayed or that the said contractor is wilfully violating any of the conditions or covenants of this contract, or is executing the same in bad faith, they shall have the power to notify the aforesaid contractor to discontinue all
85 work under this contract or any part thereof, and thereupon the said contractor shall cease to continue said work, or such part thereof; and the said agents of the corporation shall thereupon have the power to place such or so many persons as they may deem advisable, by contract or otherwise, to work at and complete the work herein described, or any part thereof, and to use such materials as they may find upon the line of said work or to procure other materials for the completion of the same, and to charge the expense of said labor and materials to the afore-

said contractor, and the expense so charged shall be deducted and paid by the parties of the first part out of such moneys as may be then due, or may at any time thereafter grow due to said contractor under and by virtue of this agreement, or any part thereof; and in case such expense is less
86 than the sum which would have been payable under this contract if the same had been completed by him, he shall be entitled to receive the difference, and in case such expense shall exceed the last said sum, he shall pay the amount of such excess to the parties of the first part on notice from said agents of the corporation of the excess so due.

[E]

And the said party of the second part hereby further agrees that he will furnish to the said agents of the corporation satisfactory evidence that all persons who have done work or furnished materials under this agreement, or who may have received or sustained any damage or injury through or by reason of any act, omission, carelessness or want of skill on the part of said contractor or his agents in prosecution of the work aforesaid, and who have given written notice to said agents of the corporation, before or
87 within ten days after the completion of the work aforesaid, that any balance for such work or materials or compensation for such damage or injury is still due and unpaid, have been fully paid or secured; and in case such evidence be not furnished as aforesaid such amount as may be necessary to meet the claims of the persons aforesaid shall be retained from the moneys due the said party of the second part under this agreement, until the liabilities aforesaid shall be fully discharged, or such notice withdrawn.

[F]

And the said party of the second part further agrees that he will indemnify and save harmless the parties of the first part from all suits or actions of every name and description brought against them for or on account of any injuries or damages received or sustained by any party or
88 parties by or from the said party of the second part, his servants or agents in the prosecution of said work, or by or in consequence of any negligence in grading the same, or of any improper materials used in its prosecution, or by or on account of any act or omission of the said party of the second part or his agents. And the said party of the second part hereby further agrees that the whole or so much of the money due to him under and by virtue of this agreement as shall or may be considered necessary by the agents of the corporation shall or may be retained by the said parties of the first part, until all such suits or claims for damages as aforesaid shall have been settled, and evidence to that effect furnished to the satisfaction of said agents of the corporation.

And the said party of the second part hereby further agrees to
89 receive the following prices as full compensation for furnishing all the materials and labor which may be required in the prosecution and completion of the whole of the work to be done under this agreement, and in all respects completing the same in the manner before specified, to-wit:

For each square yard of pavement laid, the sum of *Five Dollars and fifty-five cents* ($5.55).

For each lineal foot of new curb-stone furnished and laid, the sum of *One Dollar and seventy-five cents* (1.75).

For each lineal foot of curb that is reset, the sum of *Twenty cents* (20c.)

It being expressly understood that the measurements shall be taken after

the laying or setting of the blocks, and that the aforesaid prices cover the furnishing of all the different materials and labor and the performance
90 of all the work mentioned in this specification and agreement.

In consideration of the full and faithful performance of each and every of the agreements herein contained on the part of the party of the second part, the parties of the first part agree to pay or cause to be paid to the party of the second part the prices hereinbefore mentioned.

The estimates of the City Engineer on the number of the superficial yards of paving shall be based upon the measurement called for by the deeds of the abutters and shall be considered as a finality in settlement with the contractor.

TERMS OF PAYMENT

as follows, to-wit: Upon the completion of each section the contractor shall receive from the city the whole amount due under the condi-
91 tions of this contract for said section, the same to be paid in Memphis City Paving Bonds, payable in five, ten and fifteen years, in equal proportions, with six per cent. coupons attached, payable semi-annually, principal and interest guaranteed and provided for by a sinking fund set aside for that purpose. Bonds to be taken at par.

The privilege to use the Nicholson pavement is secured by the city for the use of the contractors and the sum of twenty-five cents per yard is to be deducted from the contract price for paving for the purpose of paying for said privilege and for contingent expenses.

The sections shall not be less than three hundred and twenty-five (325) feet nor more than four hundred (400) feet in length.

In witness whereof, The parties to these presents have hereunto set their hands and seals the day and year first above written.

92 *Exhibit C.*

MAYOR'S OFFICE,)
MEMPHIS, June 2, 1868.)

PAVING COMMITTEE.

The Committee submitted the following report, and the same was adopted by the Boards:

REPORT.

The Committee to whom was referred the petition of Taylor, McBean & Co., Abe and A. J. McBean, and Taylor, McBean & Baldwin to have transferred to T. E. Brown & Co., a firm composed of T. E. Brown and J. Langdon, all of their contracts made with the city of Memphis for grading and paving certain streets in the city, report that the transfer be made to the said T. E. Brown & Co. of those contracts first made by the city with Taylor, McBean & Co., and those transferred by the city from Forrest, Mitchell & Co. to Taylor, McBean & Baldwin, to embrace all the unfinished streets contained in these contracts and n ne other, as
93 well as all the unsettled and unadjusted claims due the contractors by the property holders and city; provided that the said T. E. Brown & Co. will execute bonds at their own cost with satisfactory security in place of those given by said parties, or get the written consent of the securities to the first bonds to stand pledged for said T. E. Brown & Co. to carry out the contracts as made with the first parties.

Filed as of Feb'y 9, '76.

H. E. ANDREWS, *Clerk.*
L. H. PILLSBURY, *D. C.*

Exhibit D.

To return of the city filed Feb'y 9, 1876.

CERTIFICATE OF INDEBTEDNESS.

No. 902.

MAYOR'S OFFICE,
MEMPHIS, TENNESSEE.

The City of Memphis is indebted to——— ——— ——— or order in the sum of ——— ———dollars, to bear interest at the rate of 6 per centum per annum from the ——— day of ———, 186—, until this certificate is redeemed. This certificate is issued under the provision of an ordinance approved the 29th day of June, 1873, passed in accordance with an act of the Legislature approved on the 24th of March, 1873, authorizing the Mayor to issue certificates of indebtedness to persons holding receipts for payments made for laying of the Nicholson and stone pavement in the streets and alleys of the city under the provisions of the charter and ordinances of the city which have been held by the Supreme Court to be unconstitutional, and is receivable only in payment of any tax that may be levied by the city of Memphis to cover the entire cost of laying the said pavements.

94

Witness the signature of the Mayor and the seal of the city this ——— day of ———, 1873.

———————, *Mayor.*

Attest:

———————, *City Register.*

Indorsed—Circuit Court of the United States, Western District of Tennessee. Filed Feb'y 9th, 1876.

H. E. ANDREWS, *Clerk.*

95

"*Exhibit E.*"

No. 1859. STATE OF TENNESSEE, "1."

CITY OF MEMPHIS,

Is indebted to Certificate No. 844, given for

PAVING RECEIPTS

ONE DOLLAR,

Bearing interest at the rate of six per cent. per annum, from the 19th day of Sept. 1867, until redeemed.

Witness our hands this 28th day of August, 1874.

M. T. WILLIAMSON, Register. JNO. LOAGUE, Mayor.

Receivable for tax levied and to be levied to reimburse those who have paid for Nicolson or Stone pavement, and for no other dues. Ordinance passed Feb. 12, 1874.

Endorsed—Filed Feb'y 9th, 1876. H. E. ANDREWS, *Clerk.*

96

Exhibit F.

To return of city to peremptory writ of mandamus. Filed February 9, 1876.

H. E. ANDREWS, *Clerk.*
By L. H. PILLSBURY, *D. C.*

IN THE CHANCERY COURT OF SHELBY COUNTY.

The Bill of Complaint of John M. Lea, a citizen of Davidson County, Tennessee, and John Overton, also a citizen of said county and State, Complainants,

vs.

The City of Memphis, a municipal corporation chartered by the laws of

Tennessee, and situated in the County of Shelby, State of Tennessee; the Mayor and General Council and F. C. Schaper, Tax Collector of said city, Defendants.

To the Honorable R. J. Morgan, Chancellor:

Your orators respectfully represent that they are owners of a number of lots of land in the city of Memphis, the said John M. Lea in right of
97 his wife, Elizabeth B. Lea, who was Elizabeth B. Overton, and your orator John Overton in his own right and title, and they were the owners of said lots as aforesaid at the time of the transactions hereinafter related, the legal taxes and assessments upon which they have always paid.

Your orators further represent that by an act passed on the 24th day of November, 1866, amendatory of the charter of the city of Memphis, and especially the fifth section of said act, the General Assembly of the State of Tennessee granted power to said city to provide by ordinance for the grading and paving of the streets, lanes and alleys in said city's corporate limits, and to charge all the costs and expense thereof on the lots and owners of the lots which bordered or abutted on said streets and alleys—said charge when made to become a specific lien upon the lots so bordering on the streets and alleys, and to be for the full cost for the grading and paving said streets or alleys to the middle thereof, and for the length for which such lot so bordered or abutted thereon.

98 The work of paving to be done under the supervision of the City Engineer, and the bill for the cost thereof to be certified by him to be correct.

Especial reference is here made to said amended city charter for a more perfect understanding of the same.

In pursuance of said legislative authority the said city by and through its authorized agents entered into contracts with divers parties to pave certain streets and alleys, and on or about the 11th day of March, 1867, said city so made a contract with certain persons styling themselves Taylor, McBean & Co. for the purpose of paving with what is known as the "Nicholson pavement" the carriage way of the whole or part of Madison, Second, Adams and Union streets, which contract was extended or supplemented by a contract of like character on the 13th day of November, 1867, to pave North Court, South Court and Monroe streets, all of which are streets lying within the corporate limits of said city.

And during the said year of 1867, on or about the 22d day of March, 1867, the said city made and entered into a contract with certain
99 persons styling themselves J. & M. Louden for the purpose of paving with stone the public wharf or landing, Front street and many of the alleys and cross alleys of said city running between and parallel with the streets. By each and all of said contracts the said Taylor, McBean & Co. and J. & M. Louden were held and bound to pave said streets with the material and in manner named therein under the supervision and direction of the City Engineer, and in consideration thereof and as payment therefor the said City Engineer was required to make estimates of the cost of said work (when certain sections or parts thereof were completed) in front of each lot or part of lot fronting or abutting on said streets and alleys so being paved, and thereupon to deliver to the contractor the bill for the costs certified to be correct and charged to the owner of each lot or part of lot abutting said streets or alleys, which bills were to be paid in the first instance by the said lot owners, but the city guaranteed to said contractors that said bills would be paid. Here special reference is made to
100 said contracts for a better understanding of the terms thereof, and

certified copies will be produced at the hearing or before if required by the Court.

Your orators further represent that on or about the 16th day of July, 1867, the said city of Memphis made and entered into a contract with certain persons styling themselves Forrest, Montgomery & Co. for the purpose of paving with "Nicholson pavement" the carriage way of Shelby, DeSoto, Beal, Poplar and Main streets; also within the corporate limits of said city, payment therefor to be made in "paving bonds" of said city; but by subsequent contract and agreement of all parties interested said contract was altered so as to provide for the same manner and conditions of payments as the contract first above mentioned; the same was also transferred to Taylor, McBean & Co., who then styled themselves Taylor, McBean & Baldwin.

And subsequent to these transactions certain persons styling themselves T. E. Brown & Co. by agreement of said city and all other parties to said contracts became the assignees of all of the foregoing contracts for
101 putting down the "Nicholson pavement" in the carriage way of the streets hereinbefore mentioned, said T. E. Brown & Co. assuming all the duties and obligations of said contracts and receiving all the benefits of said contractors, and being in all things substituted for or subrogated to the rights of said Taylor, McBean & Baldwin, Taylor, McBean & Co. and Forrest, Montgomery & Co.

Your orators further represent that by all the foregoing contracts the city of Memphis agreed to do all the grading and engineering necessary for the preparation of the streets to receive the pavement, both Nicholson and stone, and to bear the expense thereof; for all which cost of measurement and grading the said city caused bills to be made and certified to by the City Engineer and placed in the hands of the City Tax Collector, who collected the same from the owners of lots abutting the streets and alleys paved against whom they were made, and this, too, in the same manner and by the same force and compulsion of duties, warrants and other-
102 wise as were used in the collection of the ordinary revenue of the city.

Under all the several contracts hereinbefore mentioned the work of paving said streets and alleys was prosecuted vigorously to completion by the contractors of stone and Nicholson pavement, respectively, and as the same progressed estimates were made and bills rendered and certified by the City Engineer placed in the hands of the said contractors for collection, the said city delegating to said contractors and investing them with all power given by the Legislature to enforce payment of the same by suit at law or other compulsory means, and transferring to said contractors the lien created by said legislative enactment upon the lots of your orators and others for the full amount of said bills.

Your orators were thus charged and assessed upon almost every lot they owned in the city of Memphis, and not wishing to have the title to the same clouded with said liens, with the daily threats of having the same foreclosed and their property sold for the payment of said bills, and in order
103 to avoid the annoyance and great expense of defending themselves against said demand in the Court, more especially as they regarded the said city abundantly able to refund to them any unjust or illegal exactions made of them in the payment of said bills, and knew that the amount paid by them would go to the credit of the city on its account with said contractors for paving, they paid said bills to the contractors whenever the same were presented to them, a receipt given for the amount paid.

In this way, and under these circumstances of compulsion and constraint, your orators paid bills on the lots of land and for the amounts following at the date set opposite each item, to-wit:

Your orator, John Overton, paid the following:

104 FOR NICHOLSON PAVEMENT.

	June 4th, 1867, Lot 259 Second street	$743 22
May	25th, 1867, Lot 254 Second street	895 84
June	14th, 1867, Lots 353 & 354 Second street	1,763 82
May	25th, 1867, Lots 347 & 358 Second street	490 02
June	26th, 1867, Lot 246 Second street	882 58
June	3d, 1867, Lot 242 Second street	880 04
July	3d, 1867, Lot 363 Second street	893 95
March	3d, 1868, Lot 10 Second street	621 66
March	3d, 1868, Lot 484 Second street	555 22
March	3d, 1868, Lot 484 Second street	528 02
Nov.	6th, 1867, Lot 107 Main street	523 00
Nov.	11th, 1867, Lots 235 & 236 Main street	2,087 22
Aug.	26th, 1867, Lot 554 N. Court street	345 56
May	28th, 1867, Lot 567 Madison street	856 47
July	31st, 1867, Lot 354 Madison street	1,700 79
Aug.	19th, 1867, Lot 362 Union street	1,680 59
Nov.	2d, 1868, Lot 492 Union street	679 72
June	29th, 1868, Lot 579 DeSoto street	1,484 63
Nov.	28th, 1868, Lot 236 Monroe street	1,469 84
		$19,142 19

FOR STONE PAVEMENT.

June	24th, 1867, Lot 77 Front street	$1,190 22
Aug.	4th, 1867, Lot 82 Front street	387 56
	Oct. 4th, 1867, Lot 88 Front street	580 63
105	Aug. 16th, 1867, Lot 77 Front street	434 56
	Sept. 9th, 1867, Lot 88 Front street	217 42
Oct.	21st, 1867, Lot 107 Main street	209 32
Nov.	4th, 1867, Lot 259 Second street	282 55
Nov.	22d, 1867, Lots 235 & 236 Second street	888 71
Nov.	11th, 1867, Lot 242 Second street	451 12
Nov.	22d, 1867, Lot 246 Second street	444 75
July	30th, 1867, Lot 76 Front street	533 71
Aug.	19th, 1867, Lot 88 Front street	506 39
Aug.	21st, 1867, Lot 235 Second street	504 26
Aug.	21st, 1867, Lot 246 Second street	536 38
Sept.	7th, 1867, Lot 242 Second street	526 75
		$7,694 33

The aggregate amount of which are $19,142.19 for Nicholson pavement, and $7,694.33 for stone pavement, together being the total sum of $26,836 52, which your orator John Overton paid and settled with the contractors in money or its equivalent, within thirty days from the date of each item, the same being the rendition of the bills, no interest being computed thereon since the date of payment.

And your orator, John M. Lea, paid the following:

106 FOR NICHOLSON PAVEMENT.

	Feb. 18th, 1869, Lot 416 Madison street	$1,836 74
Feb.	18th, 1869, Lot 457 Second street	1,774 22
Feb.	18th, 1869, Lot 209 Second street	896 67
Oct.	1st, 1869, Lot 9, Block 64 Second street	567 62
March	3d, 1869, Lot 4, Block 65 Second street	742 73
Feb.	18th, 1869, Lot 239 Main street	626 25
Jan.	20th, 1871, Lot 1, Block 65 Main street	1 166 40
Jan.	28th, 1871, Lot 216 Main street	74 29
Sept.	16th, 1871, Lot 216 Main street	1,288 38
Feb.	17th, 1872, Lot 502 Adams street	1,000 00
Jan.	11th, 1873, Lot 502 Adams street	869 83
March	4th, 1869, Lot 499 Adams street	884 50
Feb.	18th, 1869, Lot 575 DeSoto street	1,482 78
Feb.	18th, 1869, Lot 503 Poplar street	2,295 48
Feb.	18th, 1869, Lot 569 Madison street	1,697 21
Feb.	18th, 1869, Lot 569 DeSoto street	1,247 71
Feb.	18th, 1869, Lot 502 Poplar street	2 020 66
Feb.	18th, 1869, Lot 245 Monroe street	1,751 27
July	5th, 1867, Lot 253 So. Court street	445 71
Oct.	14th, 1867, Lot 581 Union street	1,047 59
March	30th, 1868, Lot 586 Jefferson street	3,068 18
Dec.	21st, 1867, Lot 97 Main street	1,048 78
	Amount forward,	$27,803 09

	Amount forward	$27,803 09
Nov. 5th, 1867, Lot 499 Adams street		1,000 00
Dec. 18th, 1867, Lot 239 Main street		586 30
Aug. 2d, 1867, Lot 253 Second street		445 71
107 Aug. 2d, 1867, Lot 361 Second street		743 42
Oct. 14th, 1867, Lot 245 Second street		881 13
Dec. 20th, 1867, Lots 109 & 110 Main street		986 23
Dec. 23d, 1867, Lot 216 Main street		100 00
		$32,545 88

FOR STONE PAVEMENT.

Oct. 16th, 1869, Lot 216 Main street	$445 56
Oct. 16th. 1869, Lot 92 Front street	922 57
Oct. 16th, 1869, Lot 239 Main street	537 91
Oct. 16th, 1869, Lot 216 Main street	564 28
Feb. 11th, 1869, Lots 109 & 110 Main street	188 22
Dec. 14th, 1867. Lots 109 & 110 Main street	200 00
Oct. 30th 1867, Lot 85 Front street	411 43
Oct. 2d, 1867, Lot 85 Front street	1,321 37
Oct. 16th, 1867, Lot 82 Front street	1,432 03
Oct. 16th, 1867, Lot 82 Front street	48 84
Feb. 8th, 1868, Lot 245 Monroe street	442 21
Dec. 7th, 1867, Lot 239 Main street	452 87
Sept. 7th, 1867, Lot 85 Front street	531 93
	$6,499 22

FOR GRADING.

Jan. 26th, 1867, Lot 245 Monroe street	$47 44
April 3d, 1868, Lot 9, Block 4 Second street	29 23
April 3d. 1868, Lot 245 Monroe street	20 13
April 3d, 1868, Lot 4, Block 65 Second street	38 97
July 3, 1867, Lot 361 Second street	47 28
June 14th, 1867, Lot 283 Second street	48 02
108 July 30th, 1867, Lot 85 Front street	34 36
Aug. 20th, 1867, Lot 85 Front street	68 30
April 3d, 1868, Lot 239 Main street	20 44
Aug. 14th, 1867, Lot 82 Front street	22 80
April 3d, 1868, Lot 92 Front street	45 72
April 3d, 1868, Lot 499 Adams street	95 94
Aug. 30th, 1867, Lot 581 Union street	121 60
April 3d, 1868, Lots 109 & 110 Main street	18 79
Oct. 21, 1867, Lot 85 Front street	18 73
	$678 22

The aggregate amounts of which are $32,545.88 for Nicholson pavement, $6499.22 for stone pavement and $678.22 for grading, making a sum total of $39,723.35, all of which your orators paid at the date named to the said contractors, their agents or assignees, except the single item of $3068.18 paid March 30, 1868, for Nicholson pavement in front of lot 556 Jefferson street, and the amount paid for grading, which were paid to the City Tax Collector.

As to the said amounts of $3068.18, your orator, John M. Lea, paid the same to the city under the following circumstances, to-wit: Said
109 city undertook to pave in its own way and at its own expense the roadway of Jefferson street and other streets and to reimburse itself levied the special tax upon the abutting property and collected the same through its tax-collector in the same manner as the bills in the hands of contractors were collected; or in other words, the city proposed to pave the streets and collect the cost thereof from the respective property owners. Your orator is informed that the said sum of $3068.18 so paid by him was not paid out by the city on account of paving said street, but was carried into the city treasury and that bonds were issued to pay the entire costs of paving said streets; for the payment of a proportionate share of which and the interest thereon an additional tax has been and will be levied by the city. This being so, the city received said sum from your orators without consideration and upon false representations, which constitutes said city a trustee holding said sum of money for the use of your orator, Lea, and subject to his reclamations. He has heretofore petitioned the City
110 Council of Memphis, asking that this amount be refunded, but the

committee to which his petition was referred recommended its rejection and it was accordingly refused.

Your orator further represents and shows that many of the citizens and property owners in the city of Memphis refused to pay the bills presented and demanded by the city and the contractors for the costs of paving the streets and alleys bordering their several lots as aforesaid, whereupon a vast number of suits were brought and bills filed in this Honorable Court to enforce the lien of the contractors on the lots of such non-conforming property owners which the aforesaid act of the Legislature and ordinance of Memphis had given them in aid of their said demands. But upon said causes or some of the number being heard, this Honorable Court declined to enforce said liens by a sale of the lots, and pronounced the act and ordinance aforesaid null and void and contrary to the constitution of the State of Tennessee.

An appeal was taken from such decree of this Court to the Su-
111 preme Court of Tennessee and thereupon a hearing was had of the questions involved in the test case of Abner Taylor et al vs. E. B. Hart et al.

The honorable Supreme Court affirmed the decree of this Court and decided said acts and evidence conferring powers as aforesaid upon the city of Memphis, through its charter and enabling said city to exercise these powers in the manner hereinbefore described, to be unconstitutional and void.

Thus by far the greater number of lot owners in the city of Memphis who were in all things as much liable to the charges made for said pavement as your orator and many others who paid said charges by refusing escaped the payment of the same, and it at once appears that the amounts paid by your orator were illegally and wrongfully demanded and requested of them under the forms of law.

The decree of the Supreme Court having been rendered against the contractors seeking to recover the cost of the pavement from the owners
112 whose street front had been paved, the contractors turned against the city of Memphis, and upon its guaranty that the bill should be paid demanded payment of all bills thus left in their hands and unpaid from said city, and upon the refusal to pay them much vexed litigation ensued between T. E. Brown & Co. and the city in the Court of the United States, and between J. & M. Louden and said city in the Circuit Court of Shelby County, the result of all which was that said T. E. Brown & Co. recovered in the Supreme Court of the United States a judgment for the sum of $292,133.46, the same being the amount due said T. E. Brown & Co. under all the aforesaid contracts for Nicholson pavement, after giving said city credit in the account for all payments made by your orators and others as aforesaid, all of which appears from the Commissioners' report filed in said cause, and upon which said decree was founded. Your orators ask leave to file a certified transcript of so much of said report and decree as may be necessary or material to their cause as a part of this bill
113 on or before the hearing, and the said J. & M. Louden in like manner and by like reckoning, giving said city credit for all sums paid to them by your orators on account of paving, recovered a judgment for the balance due them on said account, being the amount of $32,084.27.

Your orator further shows that the whole or greater part of the said judgments are unpaid, and that the holders of the same are demanding payment of the city, and in aid of the same have procured, one or both of them, writs of mandamus to issue compelling the authorities of said city to levy and collect a tax for the payment of said judgment and cost.

It appears at once upon the recovery of said judgment and the issuance of said writs of mandamus that simple and palpable justice required that your orators and others in like category should receive some reimbursements for the sums paid out by them before they should be required to
114 share also a proportion of the amounts charged against other property owners and by reason of non-payment thus demanded of the city and its citizens at large.

Wherefore the General Assembly of Tennessee passsed a special enactment authorizing and empowering the city of Memphis to levy and collect a special tax for the purpose of reimbursing your orators and others with them the amount paid out by them under the unconstitutional and void act and ordinances hereinbefore set forth.

Said special act was passed March 24th, 1873, and is here referred to, ch. 17, secs. 1 and 2. Said city of Memphis being thus required by mandamus to levy and collect a tax for the payment of the judgments aforesaid and being also authorized by the act of the Legislature aforesaid to levy a tax for the special purpose of reimbursing your orators and others in like category to receive from them in payment for the same the receipt for amounts which they had previously paid to the contractors for said
115 city, endeavored or pretended to endeavor to obey the said writs for mandamus and to carry out the principle of equitation which it was thus authorized to do, and provided by ordinance that the Mayor should "issue to each and every person or corporation holding the receipt of the "contractors or of the city for payment actually made upon bills or ac- "counts certified to be correct by the City Engineer for or on account of "the paving of the streets and alleys of the city with the Nicholson or "stone pavement under the provisions of the city charter and the ordi- "nance of the city charging the costs of such payment upon the prop- "erty in front of which the pavement was laid down, which provisions "of the charter and ordinances have been held by the Supreme Court of "Tennessee to be unconstitutional and void,

"A certificate of indebtedness under seal of the city and countersigned "by the Register for the amount of money actually paid upon such re- "ceipt, with interest thereon at the rate of six per centum per annum "from the date of payment until the time the said certificate may
116 "be redeemed by the city."

And by a subsequent section of said ordinance it was provided "that the certificates of indebtedneass to be issued under this ordinance "shall be received at their face value and interest in payment of any "tax that may hereafter be levied by the city of Memphis to cover the "entire cost of laying the Nicholson and stone pavement," etc.

And very shortly thereafter said city by ordinance levied a tax of 70 cents on every $100 real estate and other taxables for the purpose of paying the judgment of T. E. Brown & Co., which, by the terms of the ordinance, could be paid only in money, and was termed "Mandamus Tax," and about the same time levied a further tax of 70 cents on every $100 worth of real estate and other taxables for the purpose of reimbursing, as it was called, which last tax could be paid in the certificate of indebtedness above described, said taxes amounting to $1.40 on every $100 of taxable property, was levied upon the assessments for the year 1873.

117 Afterwards, to-wit: on the —— day of ——, 1874, said city levied a further tax of 70 cents on every $100 of taxable property assessed for the year 1874, which tax was also for the purpose of paying off the

judgment of T. E. Brown & Co., and by ordinance could be paid only in money.

By reason of the tax levied aforesaid your orator John M. Lea is charged and his property encumbered with an additional amonnt of $6014.40 for 1873 and $2628.15 for the year 1874, payable only in money, by the ordinance aforesaid, and $6014.46 payable in the certificates of indebtedness aforesaid, making a total additional taxation on your orator Lea of $14,-656.95 already levied. In like manner your orator John Overton is charged and his property encumbered with a tax of $6811.35 for 1873 and $2904.-45 for 1874, payable only in money, and $6811.35 payable in certificates of indebtedness, making a total additional taxation on your orator Overton of $16,527.15 already levied, and this, too, after your orators have
118 paid more than the proportion of the cost of said pavement which would be charged to them upon a proper distribution of the whole burden by general taxation.

But said city is about to go further and levy an additional mandamus tax for the year 1875 upon all the taxable property within its limits, your orator's as well as others, and unless restrained by this honorable Court will further charge your orator's property for the year 1875 and all years to come, until the whole of the amount due the contractors as aforesaid is paid. Since the year 1873, however, the said city has levied no tax for reimbursement, and your orator is informed that no further reimbursing tax or tax to cover the entire cost of the pavement will be levied by the city; indeed, the act of Legislature authorizing the levy of said tax to cover the entire cost of the pavement passed March 24th, 1873, was repealed by the act of 1875 passed March 20, 1875, for the regulation of municipal corporations
119 and being chapter 92, sec. 81 of said act. So that said city is no longer authorized to levy a reimbursing tax, except as it may be required to do so by the courts, notwithstanding said repealing statute.

Your orator, John M. Lea, not at all believing in the good faith of said city in its attempted but deceptive plan of equalization nor that said city would ever redeem from him the certificates of indebtedness voluntarily by the levy of a tax to cover the entire cost of paving, but believing that the evidences of the just indebtedness of the city to himself would be better preserved by an acknowledgment of said indebtedness made by itself than by receipts of contractors which he held, delivered up to said city the bill receipted by the contractors and took from said city the certificate above described as one acknowledgment of its indebtedness to your orator, and he now holds the same in lieu of the original receipts taken upon payment of the money to the contractors. Your orator, John Overton, has
120 not surrendered the original bills receipted by the contractors, but holds the same as they were first taken by him. But both your orators have tendered to the City Tax Collector an amount of said certificates of indebtedness equal to the whole amount of said mandamus and reimbursing taxes assessed against them, the necessity of said Overton converting his receipts into certificates being waived by said tax-collector, and the same was refused, except as to the reimbursing tax, which could by ordinance be paid in said certificates; and your orators here tender into court for the payment of the whole amount of paving tax levied upon them—both mandamuses and reimbursing—an amount of said certificates of indebtedness sufficient to pay the same. Your orators retain their said receipt and certificates for safe keeping, but file one of each alike in form to all the rest as exhibits Nos. 1 and 2 to this bill, but the same need not be copied.

Your orators do not deny the justice of the judgment against the city and in favor of T. E. Brown & Co. and J. and M. Louden
121 and the suits of mandamus given them to enforce the same. On the contrary your orators admit that it is right and proper that the contractors should have a mandamus to collect the balance due to them, but your orators allege that they have already paid large sums of money on this account with the consent and at the request of the city, and that no further demand on this paving account can be made on them or their property until the magnitude of levies resting on the property exceeds the sum they have paid aforesaid. Nor, in an equitable point of view, could said contractors complain of the amenity of your orators from further taxation because they have paid to them and hold their receipt for the amounts paid, and in the litigation with said contractors with the city, if they intend to have any further claim upon your orators or their property, they should have assigned to your orators so much of their whole claim against the city as had been paid to them by your orators instead of giving credit to the
122 city for said amount, as was done.

All the foregoing matters alleged and stated by your orators as between the said contractors and the city of Memphis are so alleged and stated upon information, and as matters of public report and notoriety, the same abundantly appearing by an inspection of the various contracts, ordinances, Court records and writings concerning the said transactions. Your orators have not here exhibited the same on account of the voluminous nature of them, but they ask leave to file all or any part of them as the same may become material in the progress of the cause and to make them exhibits to and a part of the bill without formal amendment or motion.

Finally, your orators allege that F. C. Schaper, City Tax Collector, is demanding of your orators payment of the aforesaid mandamus and reimbursing tax except the sum of $210.00 mandamus tax and $572.92 reimbursing tax, which sums are credited to Jno. M. Lea on the tax books
123 as having been paid by tenants occupying the lands of said Lea, and is daily threatening to issue distress warrants against your orators and seize upon their personal property for the payment of said taxes, and should he fail in that, to advertise and sell the lots and lands of your orators for the full satisfaction of the same. All this your orators believe the said Schaper will do unless restrained by this Honoroble Court. And your orators are informed that the city of Memphis is about to levy other and additional taxes upon your orators' property for paying judgment upon which in time distress warrants will also issue and their lands be again exposed to sale, thus annoying and harrassing your orators wrongfully and unjustly and almost to an entire depreciation of the enjoyment of any of their said property. All of which will surely come upon your orators unless they are aided by the power of this Honorable Court to restrain and prevent the same.

Your orators further allege that the city of Memphis has no
124 property on which an execution at law could be levied and no debts due to it which could be seized by process of garnishment, and that your orators have therefore no remedy at law by which they could collect the sum of money due them as hereinbefore set forth.

Moreover the power to levy a tax for the reimbursement of your orators and others standing in the same position has been repealed by the Legislature and the power of taxation so restricted as to make it impossible for the city authorities acting within the limits of the present charter to levy taxes for the reimbursement and liquidation of said indebtedness.

Your orators do not admit the validity of such legislation, but as the city has already ceased to levy tax they do not doubt that the city will avail itself of the said legislation to avoid the levy of the proper tax, and so your orators charge that they are wholly without any convenient or adequate remedy for the collection of their debts and can only have affective relief by resort to this Court for the purpose of having their said
125 several claims set off by the decree of this Court against the taxes now assessed against your orators respectively as hereinbefore shown and against such other taxes of like nature as may be assessed against your orators respectively before the final decree in this cause. Nor can said contractors for whom said taxes are or will be levied on other citizens and property holders of Memphis complain or object to the exemption of the property of your orators from said tax until the amount of the tax exceeds the amount heretofore paid by them, for the reason that the debt for said pavement was a debt originally against the city of Memphis and its citizens in favor of T. E. Brown & Co. and J. & M. Louden as aforesaid, and the amount paid by your orators was a reduction of the said indebtedness and in this a benefit to the city of Memphis and other citizens and property owners to the amount of said payment, and was a satisfaction pro tanto to said contracts and a payment as all they could rightfully demand of your orators. Wherefore your orators allege that said contracts or the
126 said city should not claim further payment of your orators until all others have paid the paving tax to an amount bearing the same proportions to the property of each as the amount paid by your orators bear to their own property.

Upon all the foregoing facts and circumstances your orators are advised, believe and therefore charge that the payments made by them as aforesaid were illegal and unjustly demanded of them by the said city and its agents; that the charges made against them in said paving bills were in no sense of the word a tax, and though said payments were made through a mistake of the city's right to compel the same they may be recovered from said city in any Court having cognizance of the subject matter and the parties; that the law under which the said payments were enacted was a private enactment and not a public law of the land, of which all men should take notice; that the same were made under and with the inevitable danger of having multitudinous writs brought against your orators, their lots
127 seized under pretended lien and public sale made thereof for the satisfaction of said paving bills; that said duress and compulsion and said illegal exactions were made by the said city of Memphis, and for this it is liable to your orators for the full amount of said payment with interest thereon from the day said payments were made.

Again your orators are advised and charge that the payments made by them to the contractors were made upon the request of the city of Memphis, and on account of a debt due from said city to said contractors; that the sums so paid were credited to the city suits, settlements with said contractors, and were deducted from the total indebtedness of the city to them before any judgments final was rendered against said city; that the indebtedness for which said payments were made was in no sense a debt due from your orators to the contractors and they owed said contractors nothing. All of which reasons your orators are advised raise an assumpsit and implied
128 promise to pay your orators, which the Court will enforce by decree against said city and in your orators' favor for the full amount of said sums so paid, and interest from the days of payment.

And your orators further charge that not only is the said city bound by

implication at law to pay the same so due to them, but also by repeated acknowledgements and express promises to pay made by said city, made from time to time, and especially on 25th day of June, 1873, when it passed the ordinance hereinbefore set forth acknowledging in terms the justice of your orators' claim, and providing for the issuance of certificates of indebtedness as aforesaid.

The issuance of said certificates and the passage of said ordinance being the beginning of an attempt on the part of said city to pay off and cancel the indebtedness of your orators. But your orators charge that the said proposed reimbursement has never been accomplished, nor can it be until a tax is levied to pay off the entire cost of said paving, and your ora-
129 tors' claims receive in payment of their proper share of such tax, as far as the said indebtedness will go in payment of the same until the receipt and certificates of your orators are received as far as they will go in payment of all paving tax, under whatever name, before your orators can be called upon to pay said tax, or any part thereof, in cash as the same is now levied.

As illustrating the illusory attempt aforesaid by the mandamus levy of 1873, your orator, John M. Lea, would be forced to pay $6,014.46 in addition to the amount of $3.973 35-100 already paid by him to the contractors, and now represented by certificates as aforesaid, and by the reimbursing levy of 1873 he would be required to pay in such certificates or surrender the same to the city for a like amount, $6,014.40, making a total tax upon him for that year of $12,028.80, one-half in cash and one-half in scrip; and even if the plan had been carried out till the whole of the cost of
130 the paving was paid, it would have ended with your orator, Lea, having the same cause of complaint against the city, simply turning over his indebtedness from certificates to a claim against the city for the amount paid to it, and adding interest thereon from the time said payments were made.

But your orators charge that after the year 1873 the city levied no reimbursing tax, and that it will levy no other, nor will it make any other or further effort to repay to them the amount paid by them as aforesaid unless compelled by this honorable Court either to pay the amount of the claim of your orators by a special tax for the purpose, or to receive from them the evidence of their former payment in lieu of money for any paving tax now levied or to be levied for the cost of the Nicholson and stone pavements aforesaid until the amount of your orators' share of said taxes amounts to the sum heretofore paid by them, or in other words, make the whole amount of their receipts and certificates is consumed in the payment of said
131 tax.

Your orator, John M. Lea, charges that the amount of $3,068 18-100 paid by him for paving on Jefferson street, was paid to said city with its promise and express purpose of paying a part of the cost of paving said Jefferson street, which it wholly failed to do, said city instead of paying out said sum for said pavement converted the same to its other uses, and issued its bonds or obligations instead, which bonds your orators will be called upon to pay his share of and the interest thereon, which is an annual charge upon the property of your orator, Lea.

And in the same way, your orators charge they will be required to pay again their rateable share of the sums paid by them to said city for grading and engineering, and they are now annually charged with interest on the bonds or obligations of said city, given for the payment of said grading and engineering expenses when your orators have already paid as aforesaid the

amounts charged upon their property in the former levies for the
132 purpose.

Your orators charge that the taxation mentioned is for the purpose of paying a judgment against the city for an indebtedness, a large part of which your orators, at the request of said city, have paid; that the payment so made by them enured to the great benefit of the city, and the benefit of all other property owners who have made no payment to said contractors holding such judgments; that now the mandamus taxes, the reimbursing tax, and all other taxes for the paving debt are levied and charged upon your orators and their real estate until the whole of said indebted-
133 ness is paid off, or until restrained by this Honorable Court.

This your orators charge is a gross inequality in the collection of the cost of said pavement, a great injustice to them, and an outrage upon every constitutional principle of taxation, and so would be the collection of any tax from your orators until what they have already paid is refunded to them, or until a tax is levied in such proportion that your orators will receive ample remuneration for what they have paid. In which event your orators will be, as they ever are, willing and ready to pay the tax charged upon them as their rateable share. To which end they made the tender of the evidence of indebtedness as aforesaid in payment of all taxes now levied and now tender in Court said certificates and receipts to pay said taxes and any future taxes levied for the same purpose until the whole of their said claims are used in this way. But your orators charge that the remainder, if any, after paying all of such paving taxes, is a proper charge against the city of Memphis, for which they are entitled to a decree for money
134 to be paid to them under proper orders of this Court.

Upon consideration of the premises, your orators pray that the said city of Memphis and its tax collector, F. C. Schaper, be made parties to this bill by proper process; that they may be made to answer its allegations as fully as if specially interrogated thereto; that they exhibit with their said answers, or from time to time, as the same may be required, and discover all the ordinances, contracts, agreements, resolutions, &c. named in this bill and bearing upon the matters alleged; that the defendant especially answer whether or not it has not in the possession of its officers the receipted bill for payment made to the contractors, T. E. Brown & Co., or their predecessors, and to J. & M. Louden to said city by Jno. M. Lea, amounting to $39,723.35, whether or not it did receive credit for said aggregate amount in the settlement of accounts between it and T. E. Brown & Co. and J. & M. Louden, deducting the sums paid for grading and paving Jefferson street; whether or not it received credit in said settlements
135 with Brown & Louden for the amount of $26,836.52 paid by Jno. Overton to them; whether or not the sum of $3,068.18 was not paid to it by Jno. M. Lea for the paving of Jefferson street, and whether or not the cost of paving said street was paid in cash or in bonds, or in other obligations of the city now running to maturity and bearing interest; whether the items of grading or engineering herein set forth were not paid to the city by complainants, Lea & Overton; whether or not the said cost of grading was paid in money or in bonds, or other obligations of the city, now running to maturity and bearing interest, and that said city in all respects answer particularly the complainant's bill.

Your orators also pray that a writ of injunction issue restraining the city of Memphis and its Tax Collector or other officers or agents from further attempting to collect or compel payment from your complainants the account for paving taxes, both mandamus and reimbursing, or by any other

name for that purpose, which are now levied and which may be hereafter levied before a final decree in this cause, except in accordance with the tender made by complainants in the receipts or certificates as aforesaid; that said city be commanded to receive from complainants in pay-
136 ment of all the taxes aforesaid the evidences of indebtedness for payment heretofore named by them; that they refrain from issuing or causing any distress warrants or other procees for the collection of such taxes from the complainants, or from advertising or condemning or selling the lands of complainants for the payment of any such taxes, and from in any manner increasing costs and penalties as to the same, and from executing or attempting to execute any warrant or process already issued; that upon the hearing of the cause decrees may be rendered in favor of complainants and against the defendant city of Memphis for the full amount of the sums paid by them with interest thereon from the days of payment, but to be redeemed and satisfied protanto by amounts of taxes levied for paving as aforesaid and paid under orders of this Court as complainants admit to be an equitable adjustment; that if necessary an account be taken to ascertain the true indebtedness of the defendant, and that upon the rendition of the final judgment, the certificates or receipts aforesaid be delivered to said city and cancelled.

If your orators mistake in the relief asked they pray for all other proper general and special relief which the nature of their cause entitles them to, and that all proper orders and decrees be made as from time to time
137 may be necessary or expedient to attain the ends of perfect justice, and complainants will ever pray, etc.

ESTES & ELLET,
WM. W. GOODWIN,
Sols. for Complainants.

STATE OF TENNESSEE,
SHELBY COUNTY.

Personally appeared before me, E. A. Cole, C. & M., John Overton, Jr., and Wm. W. Goodwin, agents for John Overton and John M. Lea respectively, who make oath that the matter stated in this bill of complaint is true to the best of their knowledge, information and belief.

JOHN OVERTON, JR.,
WM. W. GOODWIN.

Subscribed and sworn to before me December 24th, 1875.
E. B. McHENRY, *D. C. & M.*
Subscribed and sworn to by W. W. Goodwin January 19th, 1876.
E. B. McHENRY, *D. C. & M.*

138 MOTION TO STRIKE OUT, ETC.

Filed Feb'y 10, 1875. H. E. ANDREWS, *Clerk.*

In the Circuit Court of the United States, for the District of West Tennessee:

T. E. BROWN
vs.
THE CITY OF MEMPHIS AND OTHERS.

The plaintiff moves to strike out the pretended return of the city of Memphis to the peremptory writ of mandamus herein issued, because—

1. The requirement of the said writ to have the money in Court here to pay it to the plaintiff on or before the fourth Monday of November, 1875, the return day of the writ, was absolute and cannot be satisfied or excused by anything alleged in the said pretended return.

2. The fact that the Legislature changed the assessment law was no ex-

cuse for failing to levy and collect the tax and pay over the money
139 as required by the writ. It was not necessary for the city to wait for the new assessment of the State and county for 1875. If it could not make its own assessment for the purpose of levying and collecting the tax it was commanded to levy by the said writ, which the plaintiff insists it could have done, it should have adopted for the purpose of said levy the State and county assessment for the year 1874.

3. The plaintiff's rights were beyond the control and could not be affected by the act of the Legislature of the State of Tennessee, nor by anything that has resulted from the said act.

And admitting that the matters of the said return may excuse the failure of the defendants to collect and pay over the sum they were commanded to collect and pay over by the said writ as therein required, the
140 plaintiff says that the said return does not show that the defendants have done and are doing all that they lawfully could do to comply with the requirement of the said writ, because--

1. It appears by the ordinance purporting to levy the tax exhibited with the return, that only a portion of the taxable property of the city has been assessed for taxation, and that the capital of the merchants, which is a large part of the said taxable property, is altogether omitted from the levy.

2. The return does not show what progress has been made or is being made in the collection of the said tax, nor show the length of time that will be required to collect the amount that the plaintiff is entitled to have under the said writ.

For the said reasons and others apparent, the plaintiff demurs to the said return.

141 And as to the questions submitted by the defendants in the return the plaintiff submits—

First, That the property situated in the 9th and 10th wards of the city must be taxed alike and equally with other property in the city, because—

1. The act of December, 1869. has been repealed, and there is no law exempting the said property from taxation.

2. The exemption in the act of 1869 was obligatory only upon the city and could be regarded only in distributing the taxes collected and was not a rule for taxation.

3. The constitution prevents any such exemption or discrimination as that set up in behalf of the property in the 9th and 10th wards.

4. The debt of the plaintiff for which the writ commanded the levy of the tax was not created before December, 1867, but after that time, as appears by the return, and was created before December, 1869.

142 Second, The parties who paid the assessments made upon their property by the front foot for the purpose of paying for the laying of the Nicholson and stone pavements are not entitled to pay the taxes levied upon their property in pursuance of the said writ of mandamus with certificates or receipts for such payments, nor is their property entitled to exemption from the said taxation, because—

1. The sums the said parties so paid were not taxes, but were paid voluntarily without authority of law or legal compulsion, and affords no exemption from lawful taxation, and if the parties making the said payments have any rights whatever growing out of the facts they are against the city of Memphis for so much money paid to its use.

143 2. All taxation must be equal and uniform and all property must be taxed; and the property of the said parties who paid the said

taxes cannot have an exemption from the taxes levied under the said writ of mandamus.

3. The taxes levied under the said writ of mandamus are to be devoted exclusively to the payment of the judgment of the plaintiff, and must be collected in lawful money, as the plaintiff cannot be compelled to accept anything else. Nor could the city, after accepting a debt or the evidence of a debt due from it in payment of the said taxes or a portion of them, pay the same to the plaintiff.

4. If the parties who have paid the said assessments have any rights or remedy it is, as the plaintiff insists, to have a tax levied for their especial benefit, on a tax large enough to pay the entire cost of all the pavement,
including that already paid for by the property owners, and that
144 represented in the judgment in favor of the plaintiff, either of which modes will enable them to collect what is due them without interfering with the plaintiff's rights.

The act of 24th of March, 1873, has been repealed, and there is now no law compelling or allowing the city to accept the payments made by the property owners for the Nicholson or stone pavement in satisfaction of taxes levied, nor is there any law allowing the levy of a tax for reimbursing the said parties what they have paid.

RANDOLPH, HAMMOND & JORDAN,
For Plaintiff.

Filed March 26, 1875.

H. E. ANDREWS, *Clerk.*
L. H. PILLSBURY, *D. C.*

145 AFFIDAVIT AND MOTION.

In the Circuit Court of the United States, District of West Tennessee:

T. E. BROWN
vs.
THE CITY OF MEMPHIS AND OTHERS.

I, Talmadge E. Brown, plaintiff in the above proceeding, do swear that I am informed and believe that the tax levied by the city of Memphis for the year 1875, in pursuance of the peremptory writ of mandamus from this Court returnable on the 4th Monday of November, 1875, is wholly insufficient to pay the sum of one hundred and twenty-five thousand dollars on the judgment in my favor against the city of Memphis as contemplated by the said writ.

The rate of taxation, as I am informed and believe, for the purpose of raising the said sum has been fixed at 54 cents on the hundred
146 dollars of taxable property.

And the said rate, as I am informed and believe, is being collected only on the taxable real and personal property of the city, excluding the taxable capital of merchants, which is assessed or listed for taxation separately from the other taxable property of the city. The amount of the capital of merchants so assessed for taxation for the year 1875 is about the sum of $6,000,000, as I am informed and believe.

All the rest of the taxable property of the city assessed for taxation, as I am further informed and believe, after allowing the deduction for errors and over valuations that heretofore have been made, amounts to about the sum of $23,000,000.

Included in the said amount of taxable property is the property in the 9th and 10th wards of the city of Memphis, which were added to
147 the city by the act of the Legislature of the State of Tennessee of December, 1867, to which reference is here made.

The property in the 9th and 10th wards as assessed for taxation amounts to the sum of about $2,000,000.00.

It is claimed and has been decided by the Chancellor of the Chancery Court of Shelby County, and is the opinion, as I am informed and believe, of the Judge presiding in this Court, that the property in the 9th and 10th wards is exempt from taxation for the payment of the judgment in my favor against the city of Memphis, by reason of the following state of facts:

The act of the Legislature of the State of Tennessee of the 1st of Dec. 1869, reducing into one the various acts having reference to the city of Memphis, provided, amongst other things, that the people residing
148 within the said wards should not be taxed to pay any part of the debt of the city, or interest thereon, contracted prior to the passage of the act of 1867.

The said act was expressly repealed by Section 81 of Chapter 92 of the acts of 1875, passed and approved 23d of March, 1875; but Section 68 of said act provided that any provision in the charter of such cities as exempts the people residing in any new territory from paying part of the debt of such city, contracted previous to the incorporation of such new territory, shall remain in full force, and shall not be repealed or affected by this act.

The judgment in my favor against the city of Memphis was rendered for a balance due me by the city for Nicholson pavement laid down for the city, under contracts entered into by the city, before December, 1867.
149 The pavement was in fact laid down after December, 1867, and before December, 1869—at least this is true of the greater part—though another part may have been, and possibly was, laid down before December, 1867.

The suit in which the judgment was rendered was brought in this Court in the year 1869; the judgment or decree first pronounced in this Court was in the year 1872, and the final decree entered in accordance with the mandate of the Supreme Court of the United States, was pronounced in the year 1875, all as more fully appears by the records.

Included in the said amount of taxable property so listed and assessed for the payment of the judgment is a large amount of property supposed to be of the assessed value of about $7,000,000.00, which is claimed
150 to be exempt from taxation for the payment of my judgment upon the following state of facts:

The judgment against the city is for a balance due me for Nicholson pavement laid down in the streets of the city of Memphis.

The pavement was laid down under contracts which the city made by virtue of ordinances, passed under the provisions of Section 4 of the act of the 24th of November, 1866, entitled: "An act to amend the charter of the city of Memphis, and for other purposes," by which the costs of the pavement was required to be borne by the owners of the adjoining property, and was to be apportioned and charged in the adjoining lots in proportion to their front on the street, lane or alley paved, and was to be paid by the owners respectively in the said proportions, and was to be a lien on the lots respectively, under the said contracts. The City Engineer made
151 out the accounts of the property owners or lots respectively for the portions of the costs of the said pavement that they respectively were chargeable with. And the same were to be paid by them like liabilities contracted by themselves.

The city, by a special contract, guaranteed the payment by the property owners respectively of the portions of the cost of the pavement so apportioned to them.

And it was by virtue and in consequence of the said guaranty that I recovered the judgment or decree aforesaid against the city.

Many of the property owners against whom the said accounts were so made out paid the same, and the money so paid was received and was credited on the amount due from laying down the said pavement under the said contract, or else was received and has been retained by the city itself.

152 Others of the said property owners refused to pay the sums apportioned to them and suits were instituted to test their liability therefor, and in such suits it was finally decided by the Supreme Court of Tennessee that the said act of the Legislature and the ordinances passed in pursuance of it and the contracts so far as they attempted to charge the cost of the said pavement on the abutting lots, were void, being in conflict with the constitution of the State, and that the said property owners were not liable for the said sums.

After the decision the Legislature of the State passed the act of 24th of March, 1873—Acts of 1873, chapter 67, page 102—for the purpose of enabling the city to refund to those who had paid their proportions of the costs of the said pavement the sums they had paid. In pursuance of the said act the city of Memphis, as I am informed, and believe, has issued to the parties making the said payments certificates of indebt-

153 edness for the amounts paid, to be discharged by the levy of a special tax under the act of 1873, and nearly all the parties making the said payments, as I am informed and believe, have accepted the said certificates, and those not paid by the city or taken up are yet outstanding. The said act of March, 1873, has been repealed by section 81 chapter 92 of the act of 1875.

And I am informed and believe that the Chancellor of the Chancery Court or Shelby County has decided, and that it is the opinion of the Judge now presiding in this Court, that the said property on which the said special assessments were so paid is not now liable to taxation for the payment of the judgment in my favor.

I am advised that the capital of merchants is legally taxable for the payment of my said judgment, and that the same tax should be levied and collected thereon for the payment of the judgment as on other taxable property; and that the city of Memphis and its Mayor and General Council should be compelled by an alias writ of mandamus to include the

154 capital of merchants in the taxable property for the payment of the said judgment, and to collect the tax thereon and pay the same over to me as commanded by the original writ herein.

And I am further informed and believe that heretofore only about sixty (60) per cent. of the taxes levied in the city of Memphis have been collected; that after the withdrawal of the property in the 9th and 10th wards of the city as exempt from taxation as aforesaid, and the exemption for the like reason of the property on which the special assessments to pay the costs of the pavement laid down in front of it were paid as aforesaid, the entire residue of the property taxed to pay ths judgment (not including merchants capital) is about $14,000,000, and that the money to be realized therefrom can scarcely exceed $45,000. And so, instead of realizing $125,000 on the said judgment to which I am entitled by the final judgment of this Court, I will not receive in all probability out of the levies for the year 1875 as they now stand, much more than one-third that sum.

155 In consideration of the premises I pray that I may have in addition to the writ commanding the levy and collection of the tax on

the capital of merchants a further or alias writ of mandamus commanding the city of Memphis and its Mayor and General Council to make a further or additional levy of taxes on all the taxable property of the city of Memphis, including the capital of merchants as taxable, and excluding the property in the 9th and 10th wards of the city, and the property aforesaid on which the said special assessments for the Nicholson pavement costs were so paid as exempt from such taxation, such an amount in addition to the levy already made as will be sufficient to pay to me the entire sum of $125,000 to which I am entitled as aforesaid; and that the said levy may be made upon the taxable property as assessed and returned for the year 1875, and may not be further postponed.

T. E. BROWN.

156 Subscribed and sworn to before me this 1st of March, 1876.

L. H. PILLSBURY,

U. S. Circuit Court Commissioner for Western District of Tennessee.

ORDER ENTERED MARCH 2d, 1876.

T. E. BROWN
vs.
THE CITY OF MEMPHIS ET AL. } Law Docket 1874½

In this cause the Court having on a former day of the term taken under advisement the motion of the plaintiff to strike out the paper filed as a return to the peremptory writ of mandamus herein issued returnable on the 4th Monday of November last, and it appearing to the Court that the said return is uncertain, indefinite and insufficient in its statement of the several acts that have been done in obedience to and for the purpose of complying with the requirements of the said writ, it is ordered that the said motion be sustained, and that the said paper so purporting to be a return to the said writ be stricken out and held for naught, and that the plaintiff recover of the defendants all his costs herein expended for which execution may issue.

The defendant has leave to amend his return or make further return herein on or before the 12th day of April next.

H. B. BROWN, *U. S. Dist. Judge.*

157 ORDER ENTERED MARCH 2, 1876.

TALMADGE E. BROWN,
vs.
THE CITY OF MEMPHIS ET AL. } Law Docket 1874½.

The parties appear by their respective attorneys and this cause is heard on the affidavit of the plaintiff on file, and on his motion that the court issue an alias writ of peremptory mandamus directed to the City of Memphis and its Mayor and General Council, commanding them to levy, in addition to the tax already levied, a further tax on all the taxable property of the city, excluding from such taxable property the property of persons residing in the 9th and 10th wards of the city, as exempt from taxation, for the payment of the judgment of the plaintiff, and the other property in the city on which assessments have heretofore been made by the front foot for the payment of the costs of laying the Nicholson pavement, and which assess-

158 ments have been paid by the owners of such property as also exempt from taxation, for the payment of said judgment sufficient in amount, when added to the tax heretofore levied under the original writ herein issued, to enable the plaintiff to realize the sum of one hundred and twenty-five thousand dollars, which the said original writ required to be levied, collected and paid to him. And it appearing to the

Court that the facts stated in the said affidavit are substantially true, and that by reason of the said facts the said property in the 9th and 10th wards and the said property on which the said special assessments for the payment of the costs of the Nicholson pavement have been so laid and paid is not subject to taxation for the payment of the said judgment, and that the same ought to be exempt from such taxation, and that when the said property is so excluded from taxation the residue of the property liable to taxation for the payment of the said judgment taxed at the rates heretofore fixed for the purpose by the city, will not yield an amount sufficient to enable
159 the plaintiff to realize the sum of one hundred and twenty-five thousand dollars, to which he is entitled, as appears by the said original writ.

It is therefore ordered that the motion of the plaintiff be sustained, and that an alias peremptory writ of mandamus do forthwith issue, directed to the city of Memphis, and the Mayor and General Council, commanding them to proceed, when they next levy taxes, to levy in addition to the tax already levied for the payment of the plaintiff's judgment under the requirements of the original writ herein issued, a further tax on all the taxable property of the city, excluding from such taxable property the property of persons residing in the 9th and 10th wards of the city, and the property on which the assessments for the payment of the costs of the Nicholson pavement have been paid, the same being, as the Court adjudges, exempt from taxation for the payment of the said judgments, sufficient in amount, when added to the tax heretofore levied under the original writ, to
160 yield to the plaintiff one hundred and twenty-five thousand dollars, and to collect the said taxes so to be levied as speedily as the same can lawfully be done, and to pay over to the plaintiff forthwith, from time to time, as the same may be received, the sums collected, taking his receipt therefor, and that they make due return to the Court here on the return day of the writ of the manner in which they have obeyed the same.

161 THE UNITED STATES OF AMERICA,

SIXTH CIRCUIT AND WESTERN DISTRICT OF TENNESSEE.

I, HORACE E. ANDREWS, Clerk of the Circuit Court of the United States for said Western District of Tennessee, do hereby certify that the paper hereto attached is a full, true, perfect and correct transcript of the record in the cause therein mentioned, down to and including the judgment to which the writ of error is sued out in said Court as the same now appears of record and upon the files in my office, in the following cause, to-wit: "No. 1874½—The United States ex rel Talmadge E. Brown vs. The City of Memphis et als."

In testimony whereof, I have hereunto set my name and affixed the seal of said Court, at office in the city of Memphis, this 24th day April, A. D. 1877, and of the Independence of the United States the 101st year.

[SEAL.]

H. E. ANDREWS, *Clerk.*
L. H. PILLSBURY, *D. C.*

162 UNITED STATES OF AMERICA, *ss.*

The President of the United States to the Judges of the Circuit Court of the United States for the Western District of Tennessee—Greeting:

Because in the record and proceedings, and also in the rendition of a judgment rendered in the said Circuit Court on the 2d day of March, 1876, excluding property in the 9th and 10th wards of the city of Memphis, and property on which the owners paid the special assessment levied to pay the cost of Nicholson and stone pavements from taxation for satisfaction of the decree of the 16th of March, 1875. in favor of Talmadge E. Brown against the City of Memphis, which is in a plea before you between The United States ex rel Talmadge E. Brown and The City of Memphis, John Loague, Mayor, S. B. Robbins, Owen Dwyer, C. W. Metcalf, Nick Malatesta, H. G. Dent, I. Happek, J. T. Hillsman, A. J. White, M. J. Doyle, G.
163 A. Morti, constituting the Board of Aldermen; and John Zent, P. J. Kelly, Herman Caro, William Hewitt, S. J. Camp, Alf. G. Tuther, S. W. Green, H. Luhrman, Joseph Clouston, jr., Richard Doherty, William Gay, Charles G. Fisher, J. S. Carpenter, L. Solari, J. W. Moores, J. W. Cochrane, J. D. Danbury, L. D. Grant, Jacob Moon and T. A. Ryan, constituting the Common Council of the said City of Memphis, and together comprising the General Council of said city, a manifest error hath happened, to the great damage of the said Talmadge E, Brown, as by his complaint appears. We being willing that the error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Su-
164 preme Court of the United States, together with this writ, so that you may have the same at Washington on the 2d Monday of October next, in the said Supreme Court, to be then and there held, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done to correct that error, what of right and according to the laws and customs of the United States should be done.

Witness, the Hon. MORRISON R. WAITE, Chief Justice of the said Supreme Court, the 18th day of April, in the year of our Lord one thousand eight hundred and seventy-seven.

HORACE E. ANDREWS, Clerk of the Circuit Court of the United States for the Western District of Tennessee.

[SEAL]

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165 SUPREME COURT OF THE UNITED STATES.

THE UNITED STATES ON THE RELATION OF TALMADGE E. BROWN *vs.* THE CITY OF MEMPHIS ET AL. } 1874½.

Know all men by these presents, that we, Talmadge E. Brown and Wm. M. Randolph, are held and firmly bound unto the city of Memphis, John Loague, Mayor, S. B. Robbins, Owen Dwyer, C. W. Metcalf, Nick Malatesta, H. G. Dent, I. Happek, J. T. Hillsman, A. J. White, M. J. Doyle, G. A. Morti, constituting the Board of Aldermen, and John Zent, P. J. Kelly, Herman Caro, William Hewitt, S. J. Camp, Alf. G. Tuther, S. W.

Green, H. Luhrman, Joseph Clouston, jr., Richard Doherty, William Gay, Charles G. Fisher, J. S. Carpenter, L. Solari, J. W. Moores, J. W. Cochrane, J. D. Danbury, L. D. Grant, Jacob Moon and T. A. Ryan, constituting the Common Council of the said city of Memphis, and together composing the General Council of said city, in the sum of five hundred dollars,
166 to be paid to the said obligees, their executors or administrators; to which payment well and truly to be made, we bind ourselves, and each of us jointly and severally, and each of our heirs, executors and administrators, firmly by these presents.

Sealed with our seals, dated this 18th day of April, 1877.

Whereas, the above named, the United States ex rel Talmadge E. Brown have prosecuted a writ of error to the Supreme Court of the United States to reverse the judgment rendered in the above entitled action by the Circuit Court of the United States, for the Western District of Tennessee.

Now therefore, the consideration of this obligation is such, that if the above named, the United States ex rel Talmadge E. Brown, shall prosecute the said writ of error to effect, and answer all costs, if they shall fail to make good their plea, then this obligation shall be void, otherwise
167 to remain in full force and virtue.

T. E. BROWN, [L. S.]
WM. M. RANDOLPH, [L. S.]
[L. S.]
[L. S.]

Acknowledged and approved by and before me this 18th day of April, 1877. H. E. ANDREWS, *Clerk.*

Endorsed—Filed April 18, 1877,
H. E. ANDREWS, *Clerk.*

CITATION.

168 UNITED STATES OF AMERICA, *ss.*

The President of the United States to the City of Memphis, John Loague, Mayor; S. B. Robbins, Owen Dwyer, C. W. Metcalf, Nick Malatesta, H. G. Dent, I. Happek, J. T. Hillsman, A. J. White, M. J. Doyle, G. A. Morti, constituting the Board of Aldermen; and John Zent, P. J. Kelly, Herman Caro, Wm. Hewitt, S. J. Camp, Alf G. Tuther, S. W. Green, H. Luhrman, Joseph Clouston, jr., Richard Doherty, Wm. Gay, Charles G. Fisher, J. S. Carpenter, L. Solari, J. W. Moores, J. W. Cochrane, J. D. Danbury, L. D. Grant, Jacob Moon and T. A. Ryan, constituting the Common Council of the said City of Memphis, and together comprising the General Council of said city—Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington on the 2d Monday of October next pursuant to a writ of error filed in the Clerk's office of the Circuit Court of the United States for the Western District of Tennessee,
169 wherein the United States ex rel Talmadge E. Brown are plaintiffs and you are defendants in error, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected and speedy justice should not be done to the partjes in that behalf.

Witness the Hon. MORRISON R. WAITE, Chief Justice of the said Supreme Court of the United States, this 20th day of April, in the year of our Lord one thousand eight hundred and seventy-seven.

CONNALLY F. TRIGG, *U. S. District Judge.*

170 I hereby waive service of this citation on behalf of the defendants;

and agree that the cause may be heard and determined at the present term of the Supreme Court of the United States, if the Court will so hear it; and I waive a copy of the writ of error and of the citation, and will appear for the defendants as if all formal steps had been taken.

April 18th, 1877. S. P. WALKER, *Att'y for Def'ts.*

We agree as above.

RANDOLPH, HAMMOND & WASSELL, *For T. E. Brown.*

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171 No. 1874½.

Circuit Court of the United States,

(WESTERN DISTRICT OF TENNESSEE.)

TALMADGE E. BROWN,
vs.
THE CITY OF MEMPHIS AND OTHERS

Writ of Error to Supreme Court U. S., from judgment of 2d March, 1876, excluding property in the 9th and 10th wards of the City of Memphis, and property on which the owners paid the special assessments levied to pay the cost of the Nicholson and stone pavements from taxation for satisfaction of the Decree of 16th March, 1875, in favor of Talmadge E. Brown vs. The City of Memphis.

In the above cause, it is hereby agreed by and between Talmadge E. Brown and The City of Memphis, and their respective counsel, that the record shall be printed at once, and filed in the Supreme Court, and
172 that the counsel shall, without delay, prepare and print their respective briefs, and that the cause shall be submitted on brief for decision at the earliest moment at which the same can be done.

April 16th, 1877.

CITY OF MEMPHIS,
By S. P. WALKER, City Att'y.
WM. M. RANDOLPH,
Counsel for T. E. Brown.

(Endorsed.)

No. 1874½.

Circuit Court of the United States.

(WESTERN DISTRICT OF TENNESSEE.)

T. E. BROWN
vs.
THE CITY OF MEMPHIS.

STIPULATION.

Filed April 16th, 1877. H. E. ANDREWS, *Clerk.*
By L. H. PILLSBURY, *D. C.*

THE UNITED STATES EX REL
TALMADGE E. BROWN
vs.
CITY OF MEMPHIS ET AL.

CLERK'S FEES:

Transcript	$40 00
Bond, Writ, Copies, etc	7 50
Total	$47 50

Paid by T. E. Brown. H. E. ANDREWS, *Clerk.*

No 778

Supreme Court of the United States.

OCTOBER TERM, 1877.

THE UNITED STATES
ON THE RELATION OF
TALMADGE E. BROWN.
VS.
THE CITY OF MEMPHIS AND
OTHERS.

WM. M. RANDOLPH, *Of Counsel for T. E. Brown.*

Tracy & Co., Printers, 295 Second St., Memphis.

Supreme Court of the United States.

OCTOBER TERM, 1877.

THE UNITED STATES
ON THE RELATION OF
TALMADGE E. BROWN.
VS.
THE CITY OF MEMPHIS AND
OTHERS.

STATEMENT OF THE CASE.

On the 16th of March, 1875, Talmadge E. Brown recovered in the Circuit Court of the United States for the District of West Tennessee in equity of the City of Memphis a decree for $292,-133.47, which decree was entered in pursuance of the direction of this Court on remanding the cause, after reversing a former decree. Printed Record, p. 1–4.

See 20 Wallace, 290, 322.

An execution having issued on the decree and been returned no property found, on the 22d of March, 1875, Brown filed his petition for a writ of mandamus to compel the levy and collection by the city of a tax, to be apportioned to the three ensuing years, sufficient for the satisfaction of the decree, and the payment of the

same to him on account of what was due him from time to time as collected. Record, p. 4–7.

An alternative writ was awarded, issued and served, and made returnable on the 26th of March, 1875, and on that day the Mayor and the members of the General Council on behalf of the city filed their return or answer, wherein they set up various reasons why they or the city should not comply with the requirements of the writ. Record, p. 7, 9–10.

Brown filed a demurrer to the return or answer, and on the 30th of March, 1875, the cause was heard on the demurrer, and the Court adjudged that the demurrer be sustained; and the defendants saying nothing further in bar of the remedy sought by the plaintiff, the Court further adjudged that "the City of Memphis and its General Council proceed each year for the ensuing three years—that is, 1875, 1876 and 1877, respectively—at the same time and in the same manner that other city taxes are assessed and levied and collected, to assess, levy and collect upon *all* the property within the city *taxable by law* a tax in addition to all other taxes allowed by law, payable in the lawful money of the United States of America, sufficient in amount, after making due allowance for all delinquencies, insolvencies and defaults, to realize one hundred and twenty-five thousand dollars each year for the years 1875 and 1876 respectively, and so much of the said sum for the remaining year 1877 as may be necessary to pay and satisfy the balance of the said decree, including costs and interest, not satisfied by the taxes collected and paid over during the two preceding years, and to pay over the same as fast and from time to time as the same might be collected directly to the said Talmadge E. Brown or into court to be forthwith paid him without the further order of the court until the whole amount of the said decree, including the costs of the suit and the interest that has accrued or may accrue thereon, be paid and discharged." Record, p. 11–12.

And it was further ordered that the Clerk of the Court, whenever Brown should request it, issue each year during the said years 1875, 1876 and 1877, respectively, a peremptory writ of mandamus, in accordance with the foregoing judgment, to be served on the City of Memphis and its Mayor and General Council in the manner prescribed by law.

The peremptory writ of mandamus for the year 1875 under the foregoing judgment was issued on the 28th of June, 1875, and was served on the 29th of June, and return made of the service by the Marshal. On the 10th of December, 1875, the General Council of the city passed the following ordinance, approved by the Mayor on the 14th of December: "That a special tax of 54 cents on the $100 worth of property be and the same is hereby levied for the 48th corporate year (1875) for the purpose of paying one hundred and twenty-five thousand dollars of the judgment rendered by the United States Circuit Court in favor of T. E. Brown against the city, as required by the writ of mandamus heretofore served upon us." Record, p. 13–14.

On the 9th of February, 1876, the city and the General Council filed what purports to be a return to the peremptory writ of mandamus. Record, p. 15–39.

Brown moved to strike out the return, and the Court, on the 2d of March, 1876, ordered it to be stricken out. Record, p. 39–41–44.

Brown, on the 1st of March, 1876, filed an affidavit stating that the tax which had been levied for the year 1875 under the peremptory writ of mandamus was insufficient to pay the sum of one hundred and twenty-five thousand dollars as contemplated by the writ; that the taxes levied were not being collected on the capital of merchants, nor on the taxable property in the Ninth and Tenth wards of the City of Memphis, nor on certain other of the taxable property of the city, on which the owners had paid certain assessments, charged by the front foot thereon, for the cost of the Nicolson and stone pavements, laid down in front of such property by the said Brown and other contractors, under the contracts with the city. Record, p. 41–44.

That the property in the Ninth and Tenth wards of the city, assessed for taxation for the payment of Brown's decree at about two millions dollars, it was claimed, and had been decided by the Chancellor of the Chancery Court of Shelby county, and was the opinion, as Brown was informed and believed, of the Judge then presiding in the Circuit Court of the United States (Hon. Henry

B. Brown), was exempt from taxation for the payment of the decree in favor of Brown, by reason of the following state of facts:

The act of December, 1869, reducing into one the various acts having reference to the City of Memphis provided that "the people residing within the said wards should not be taxed to pay any part of the debt of the city or interest thereon contracted prior to the passage" of the act of December, 1867, adding the said wards to the city.

The judgment in favor of Brown was rendered for a balance due him by the city for Nicolson pavement laid down for the city in its streets under contracts entered into by the city before December, 1867.

The pavement was in fact laid down after December, 1867, and before December, 1869; at least, this is true of the greater part, though some part may have been laid down before December, 1867.

Brown brought his suit in which he recovered his decree against the city in the Circuit Court of the United States in the year 1869. The first decree in his favor was pronounced in the year 1872, and the final decree, in pursuance of the mandate of the Supreme Court of the United States, in the year 1875.

That the property on which the owners had paid the front foot assessment for the cost of the pavements, assessed for taxation for the payment of Brown's decree at the value of about seven millions dollars, was claimed to be exempt from taxation for the payment of Brown's decree on the following state of facts:

The pavement, the balance of the cost of which Brown's decree represented, was laid down in the streets of the city under contracts made by the city under ordinances passed under the provisions of section 4 of the act of 24th of November, 1866—Acts of 1866–1867 (private), ch. 8, p. 19–20—entitled "An act to amend the charter of the City of Memphis and for other purposes," by which the cost of the pavement was required to be borne by the owners of the adjoining property, and was to be apportioned and charged on the adjoining lots in proportion to their front on the street, lane

or alley paved, and was to be paid by the owners, respectively, in the said proportions, and was to be a lien on the lots respectively under the said contracts. The City Engineer made out the accounts of the property or lots respectively for the portions of the cost of said pavement they respectively were chargeable with, and the same, the act of the Legislature declared, were to be paid by them like liabilities contracted by themselves.

The city, by a special provision in the contracts, guaranteed the payment by the property owners respectively of the portions of the cost of the pavement so apportioned to them.

Brown recovered of the city the decree aforesaid for the balance due by the property owners under the apportionment aforesaid amongst them of the cost of the pavement.

Many property owners paid the portions of the cost of the pavement apportioned to them to Brown and the other contractors in whose hands the accounts were placed for collection by the city, under the contracts and ordinances, and who gave the city credit for the sums collected, or else the property owners paid such portions directly to the city.

Others refused to pay the assessments, and suits were brought to collect them, and such suits resulted in a final decision by the Supreme Court of Tennessee that the act of the Legislature and the ordinances passed under it, and the contracts between the city and Brown, as far as they attempted to charge the cost of the pavements on the abutting lots, were void, being in conflict with the constitution of the State, and that such property owners were not liable for the sums charged against them.

Taylor vs. Chandler, 9 Heiskell, p. 349.

After the above decision the Legislature passed the act of 24th of March, 1873 (Acts of 1873, ch. 67, p. 102), one object of which was to enable the city to refund the sums paid to those who had paid their proportions of the cost of the pavements as assessed upon them, as aforesaid.

In pursuance of an ordinance passed under the act of March 24, 1873, the city issued to many of the persons making the said pay-

ments certificates of indebtedness for the amounts paid by them, to be discharged by the levy of a special tax, under the act of 1873, and all of them had the right to demand, and receive, upon making proof of such payments, such certificates of indebtedness for the sums paid.

The act of 24th of March, 1873, was repealed by section 81 of the act of 18th of March, 1875.

Acts of 1875, ch. 92, p. 167–168.

After stating these facts in his affidavit, Brown proceeds to state further that he is informed and believes that the Chancellor of the Chancery Court had decided, and that it was the opinion of the Judge then presiding in the United States Circuit Court (Hon. Henry B. Brown), that the said property on which the said special assessments were so paid was not then liable to taxation for the payment of the decree in his favor.

Record p. 43.

The affidavit insists that the capital of merchants ought to be taxed as other property. It states that only about sixty per cent. of the taxes levied in the City of Memphis had before then been collected; that after the withdrawal of the property in the Ninth and Tenth Wards as exempt, and the exemption of the property on which the special assessments laid to pay the cost of the pavement laid down in front of it were paid as aforesaid, the entire residue of the property taxed to pay Brown's decree (not including merchants' capital) was about fourteen millions dollars, and the money to be realized therefrom could scarcely exceed forty-five thousand dollars. And so, instead of realizing one hundred and twenty-five thousand dollars on the decree to which Brown was entitled by the final judgment of March 30, 1875, he would not receive in all probability out of the levies of 1875, as they then stood, much more than one-third that sum.

In consideration of the premises, Brown prayed that in addition to the writ commanding the levy and collection of the tax on the capital of merchants, also prayed in the affidavit, a further or alias writ of mandamus, commanding a further or additional levy of taxes on all the taxable property of the City of Memphis, as already assessed and returned for taxation for the year 1875, including the

capital of merchants as taxable, and excluding the property in the Ninth and Tenth Wards and the property aforesaid on which the said special assessments for the cost of the Nicolson pavement were so paid as exempt from such taxation, sufficient, with the levy already made, to pay Brown the entire sum of one hundred and twenty-five thousand dollars to which he was entitled as aforesaid.

On the 2d of March, 1876, the parties appeared by their attorneys and the cause was heard on the affidavit of Brown and on his motion for an alias peremptory writ of mandamus, in accordance with the prayer in his affidavit, and the Court being satisfied that the statements of the affidavit were substantially true, and that by reason of the facts therein the property in the Ninth and Tenth wards and the property on which the special assessments for the payment of the cost of the Nicolson pavement had been laid and paid, were not subject to taxation for the payment of Brown's decree, and ought to be exempt therefrom, and that the residue of the property liable to taxation for the payment of Brown's decree would not yield enough to realize the one hundred and twenty-five thousand dollars he was entitled to, ordered that an alias peremptory writ of mandamus issue commanding the levy, when the city next levied taxes, in addition to the tax already levied, of a further tax on all the taxable property of the city, excluding from such taxable property the property of persons residing in the Ninth and Tenth wards and the property on which the said special assessments for the payment of the cost of the Nicolson pavement had been paid, the same being as the Court adjudged, exempt from taxation for the payment of the said decree of the said Brown, sufficient in amount when added to the tax theretofore levied under the original writ to yield to Brown one hundred and twenty-five thousand dollars, and collect the same as speedily as could lawfully be done, and pay over the amounts collected to Brown as collected and make return to the Court of the manner in which the writ had been obeyed. Record, p. 44–45.

No writ has been issued under the judgment. But the present writ of error has been sued out to reverse it.

ASSIGNMENT OF ERRORS.

[1]

The court erred in directing the alias writ of mandamus to com-

mand the levy of the additional tax, excluding the property in the Ninth and Tenth wards of the city as exempt from taxation for the payment of Brown's decree.

[II]

And erred in directing the said writ of mandamus to command the levy of the said tax, excluding the property on which the assessments by the front foot for the cost of the pavement had been paid, as exempt from taxation for the payment of Brown's decree.

[III]

The petition or motion of Brown was for the levy of an additional tax for the year 1875. [Record p. 44.] The judgment of March 30, 1875, and the writ of mandamus under it, entitled him to a levy on the property assessed for taxation for that year. [Record p. 12, 14.] The Court declined ordering the levy to be made on the assessment for 1875, and ordered it to be made on the assessment for 1876, and, in doing so, erred.

There are two principal questions:

1. Did the Court err in ordering the levy of the tax to pay Brown's decree, excluding the property in the Ninth and Tenth wards of the city as exempt?

2. Did the Court err in ordering such levy, excluding the property on which the front foot assessments for the cost of the pavements had been paid as exempt?

And to these may be added a third and subordinate question, Whether Brown, by reason of the position he occupies—having made the affidavit and motion on which the judgment purports to proceed—is thereby precluded from assigning error and asking a reversal of the judgment?

The question presented by the third assignment of errors will not be separtely argued. Brown's right to the additional levy on the assessment for 1875 appears to me to rest on the question of fact whether the judgment of 30th of March, 1875, gave him the right to one hundred and twenty-five thousand dollars out of the

taxes to be collected for that year. As it unquestionably did, the duty to levy the additional tax on the assessment for that year followed from the fact that the original levy was not sufficient to pay that sum. Brown prayed such a levy, and I submit the Court should have granted what he asked, or have refused his petition entirely; and that it had no right to substitute a levy for 1876 in the place of one for 1875, especially as the tax for 1875 had been levied but a short time and was still in process of collection. Record, p. 41.

I

Did the Court err in ordering the levy, excluding the property in the Ninth and Tenth wards therefrom?

I contend it did for the following reasons:

[1]

In the answer or return of the city to the alternative mandamus sued out by Brown on the 22d of March, 1875, the city made the defense that "by the provisions of the law governing the City of Memphis there were certain wards, to-wit: the Ninth and Tenth wards, generally denominated as the new limits, which were exempted from the payment of any tax to pay certain indebtedness of the city, and the writ did not show whether the indebtedness was one of the excepted classes or not and the determination of the question was a judicial one which the respondents could not safely decide for themselves and should be determined upon the face of the writ." Record, p. 10.

To this particular defense Brown demurred, because—

"As a matter of fact the debt due him had accrued since the act of 1867; at any rate, the defendants did not show that it accrued before, and the constitution and law require all taxes to be equal and uniform, and that no one species of property thall be taxed higher or lower than any other property of equal value, and prevent the exemption of any property from taxation; and the act of March, 1873, makes no discrimination in favor of any person or class of persons." Record, p. 11.

In its judgment of 30th of March, 1875, after reciting that the

return presented no good cause for not complying with the requirements of the alternative writ, and that the demurrer was well taken, the Court sustained the demurrer, and the defendants saying nothing more in bar or preclusion of the remedy sought by the plaintiff, further ordered and adjudged that the city proceed in the manner therein directed to assess, levy and collect upon *all the property* within the city *taxable by law*, a tax in addition to all other taxes," etc. Record, p. 12.

This judgment remains in full force, and the original levy of taxes for the year 1875, to pay in part the decree in favor of Brown, was made under its authority and in pursuance of its requirements. Record p. 15 and 18.

Upon this state of facts I insist that the question of the liability of the property in the Ninth and Tenth wards, or the persons residing therein, to taxation for the payment of Brown's decree, was not an open question in March, 1876, when Judge Brown undertook to pass upon and decide it, but was closed and concluded and could not be raised or considered except in a Court exercising appellate jurisdiction; and hence, that Judge Brown erred, if he did not altogether exceed his jurisdiction, when he undertook, upon a summary application and motion, made *ex parte*, in the course of the case, after a final judgment, and after the term at which it was rendered had finally adjourned, to decree such property exempt from such taxation, when such final judgment had established the contrary.

In Clearwater vs. Meredith, 1 Wallace, 25, the 4th division of the syllabus is: "On demurrer to any of the pleadings which are in bar of the action, the judgment for either party is the same as it would have been on an issue in fact joined upon the same pleadings, and found in favor of the same party; and judgment of *nil capiat* should be entered, notwithstanding there may be also one or more issues of fact; because, upon the whole, it appears that the plaintiff had no cause of action."

1 Wallace, 43.

Aurora City vs. West, 7 Wallace, 82, 98–100, is to the same effect.

And that a final judgment cannot be corrected, altered, modified or changed after the final adjournment of the term at which it was rendered, is universally admitted to be the law.

Sibald vs. United States, 12 Peters, 488, 492. In this case the Court said: "No principle is better settled, or of more universal application than that no Court can reverse or annul its own final decrees or judgments, for errors of fact or law, after the term in which they have been rendered, unless for clerical mistakes; * * * * * nor reinstate a cause dismissed by mistake; * * * * * from which it follows that no change can be made, which may substantially vary or affect it in any material thing. Bills of review in equity, and writs of error *coram vobis* at law, are exceptions which cannot affect the present motion."

And the subsequent case of Bank of the United States vs. Moss, 6 Howard, 31, went still further and held that "after a Circuit Court had adjourned without day, it could not set aside one of its own judgments upon motion, even for want of jurisdiction over the cause; and that the judgment was binding till reversed on error."

6 Howard, 37–40.

And the cases cited, and others, I submit, show that there was a total want of jurisdiction in the Court in March, 1876, when Judge Brown undertook to reverse or alter the judgment of March, 1875, by which the Court had definitely settled that the property in the Ninth and Tenth wards should be taxed to pay the balance on Brown's decree.

Freeman on Judgments, Secs. 96, 101, 120–121, and 69–70.

Washington Bridge Co. vs. Stewart, 3 Howard, 413.

[2]

The Legislature has never undertaken to exclude, by name, the Ninth and Tenth wards from taxation to pay Brown's decree. To come within the words of the act attempting to confer the exemption, it must appear that Brown's debt was a part of the debt of the city *contracted* prior to the passage of the act of 1867. Brown's affidavit contains all that is in the record on this subject. It there appears that the debt accrued for Nicolson pavement laid down for the city after December, 1867, and before December, 1869, under contracts entered into by the city before December, 1867. Record, p. 42.

[*a*]

Without undertaking to argue the proposition, I insist that the debt to Brown was not *contracted*, in the sense of the act of the Legislature, until Brown had completed the laying of the pavement under the contracts, and hence not until after December, 1867, and so, was not embraced within the class for which it was declared the Ninth and Tenth wards should not be taxed. It was so adjudged by the Court in its judgment of 30th of March, 1875, the point being expressly set out in the demurrer, 4th cause. Record, p. 11, 12.

For one of the contracts under which the pavement was laid down, see Record, p. 18–26.

[*b*]

Conceding for the argument, the incorrectness of the last proposition, I contend—

That the question whether Brown's debt was, or was not, one of the debts for which the Ninth and Tenth wards could be taxed, was a question for the city, or for the officers assessing and levying taxes, to determine at the time of making the assessment and levy for the payment of Brown's decree, and that their action in making the determination is final and conclusive, except as it may be questioned, and to the extent only to which it may be questioned by some appellate tribunal in reviewing and revising it.

The charter of the city provides:

"The General Council shall have power to pass all laws or ordinances which may be necessary for the prompt and efficient collection of the revenue of the city, not in conflict with the laws of the State for enforcing the collection of revenue."

Acts of 1875, ch. 92, sec. 70.

And the charter provides further that "the assessment of real and personal property of the city by the State or county tax assessor for State and county purposes, shall be the assessment for city purposes."

Acts of 1875, ch. 92, sec. 63, p. 159.

The city ordinance in force when the assessment for the year 1875 was made provided:

"And the assessment books as returned to and deposited in the Mayor's office, except so far as appealed from within the time aforesaid, and the modifications and changes made therein by the General Council within the time and in the manner aforesaid, shall be conclusive and binding upon all persons whomsoever, and the said assessment books shall not afterward be changed, altered or modified in any manner whatsoever."

Ordinances of Memphis of 1876, sec. 328, p. 133.

After the assessment had so become final and conclusive, the Comptroller, by the next section, was required to make the tax books.

Ordinances of Memphis, sec. 329.

And the State law provided modes of correcting errors in assessments before the Assessor, before the Board of Equalization and by appeal to the County Court. And then declared that the application to correct erroneous assessments after the Assessor had made his returns to the Clerk of the County Court "should be made at the first term of the Quarterly Court occurring more than thirty days after the return by the Assessor, and *never thereafter*, excepting, however, as to non-residents, who should have until the second term of said Court, but not longer."

Ch. 81, sec. 2, Acts of 1875, p. 108.

After the assessment had so become final, the Clerk of the County Court was to make the tax books and deliver them to the Collector.

Whether the system provided for the State or that provided for the city be regarded, before the tax book was placed in the hands of the Collector, the right to question the assessment had been barred.

This question was considered by the Court in Cheatham vs. United States, Opinion by Mr. Justice Miller, 92 United States, 85.

The authorities are uniform that under such legislation a party who has been assessed in the manner prescribed by law, though for property not liable to taxation, or in some other respect erroneously, and has not availed himself of the remedies the statute provides, or has resorted to them without getting the relief he desires, has no other remedy, and must submit to the assessment.

County Court of Obion County vs. Marr, 8 Humph., 634.
Bourne vs. Boston, 2 Gray, 494, 496.
Salmond vs. Hanover, 13 Allen, 119.
Rhodes vs. Cushman, 45 Indiana, 85.
Windsor vs. Field, 1 Conn. R., 279.
Hughes vs. Kline, 30 Penn. St., 230.
Weaver vs. State, 39 Alabama, 535.
Conlin vs. Leaman, 22 Calif., 546.
Peoria vs. Kidder, 26 Illinois, 351.
Deane vs. Todd, 22 Misso,, 90.
Aldrich vs. Railroad Co., 21 New Hampshire, 359.

And a Court of Equity does not grant relief in such cases.

Dows vs. Chicago, 11 Wallace, 108.
State Railroad Tax Cases, 92 United States, 575. 612-618.

[3]

The territory now known as the Ninth and Tenth wards of the city was taken into the city by the act of the 3d of December, 1867.

Acts of 1867-1868 (private), ch. 36, p. 65.

The act, after describing the boundaries of the entire city, declares, in section one (1), that the district "is hereby united and erected into one city, to be called the City of Memphis:"

Section two (2) divides the added territory into two wards and describes their boundaries, and provides for the election of aldermen and for their terms of office.

The rest of the act is immaterial here.

The act, it is thus seen, provides only for the incorporation of the new territory as a part of the city, and contains no provision for a division or distribution of the existing debt of the city, or for

any exemption or discrimination in favor of the newly-admitted territory or its inhabitants from taxation or the other burdens common to the rest of the city.

What, therefore, was the effect of the act, taken by itself, upon the Ninth and Tenth wards and the people residing there?

The common understanding is, it placed them on an exact equality with the rest of the city; entitled them to the same rights and privileges and imposed upon them like burdens and charges. And such is the law.

The result of the authorities is, that new territory brought into an existing municipal corporation, without provision to the contrary, is thereby subjected to taxation in like manner and to the same extent as the territory previously within the corporation, even though such taxation be for the purpose of discharging pre-existing municipal indebtedness.

Dillon on Municipal Corporations, secs. 126, 36.
Powers vs. Wood County, 8 Ohio St., 285, 290.
Blanchard vs. Bissell, 11 Ohio St., 96, 99–100.
Cheaney vs. Hooser, 9 Ben. Monroe, 330, 334–338, 339–341, 343–349.
Sharp vs. Dunnavan, 17 Ben. Monroe, 223, 230–232.
Swift vs. Newport, 7 Bush (Ky.), 37.
Layton vs. New Orleans, 12 Louisiana An., 515.
Wade vs. Richmond, 18 Grattan, 583, 620–622.
St. Louis vs. Russel, 9 Missouri, 507.
St. Louis vs. Allen, 13 Missouri, 400, 412–415.
Chandler vs. Boston, 112 Massachusetts, 200.
McCallie vs. Mayor and Aldermen of Chattanooga, 3 Head, 317.
And see also Governor vs. McEwen, 5 Humphreys, 241, and Memphis vs. Memphis Water Company, 5 Heiskell, 495, 527.

As has already been shown, the contracts under which the debt to Brown arose were made before December, 1867. And all the work under the contracts was done before December, 1869.

It was not till the act of 1st of December, 1869, that any attempt was made by the Legislature to discriminate in favor of the Ninth

and Tenth wards, or the residents of them, in respect to the debt of the city when they were admitted into it. That act contained the following proviso: "*Provided*, That the people residing within the limits of the addition made to the city by the act of 1867 shall not be taxed to pay any part of the debt of the city, or interest thereon, contracted prior to the passage of the said act of 1867."

Acts of 1869–1870 (private), ch. 26, sec. 2, p. 226.

The act of 18th of March, 1875, adds nothing to the act of 1869, but provides merely for its continuing in force.

Acts of 1875, ch. 92, sec. 68.

If the act operates according to its purport, it is apparent that the Ninth and Tenth wards, or their people, are thereby relieved of responsibility, not only for Brown's debt, if that was contracted before December, 1867, but of liability for all the debts of the city existing at the passage of the act of December, 1867.

I will not deny that the Legislature might have provided, when it brought the Ninth and Tenth wards into the city, that the property therein should not be taxed for the purpose of paying any part of the existing debt of the city.

But, as the act of admission was passed without any such provision, and the Ninth and Tenth wards, upon admission, were, by law, placed on an exact equality with the residue of the city, both as to rights and privileges and obligations and duties, including the obligation to pay Brown's debt, I contend the Legislature had no power, by the act of December, 1869, to do what it attempted to do, namely, relieve the people of the Ninth and Tenth wards of their liability to pay their proportion of the debt of the city existing at the time they came into it.

[*a*]

The first objection to the act of December, 1869, is, that it violates Article I, sec. 20, of the Constitution of 1834, providing that "No retrospective law, or law impairing the obligation of contracts shall be passed." See same provision in Constitution of 1870, Art. I, sec. 20.

If the act attempts to do what I have tried to show it does, it is

not necessary for me to argue it violates the obligation of Brown's contracts with the city, and is retrospective. I need do no more than refer to the cases in Tennessee on the construction of the section of the Constitution.

Fisher's Negroes vs. Dabbs, 6 Yerger, 119, 157–166.
Wally's heirs vs. Kennedy, 2 Yerger, 554.
Tucker vs. Burns, 2 Swan, 35.
Wood vs. Orr, 10 Yerger, 505.
School Commissioners vs. the State, 7 Humph., 113.
Richardson vs. Wilson, 8 Yerger, 67, 79–83.
Greenfield vs. Dorris, 1 Sneed, 548.
Hannum vs. Bank of Tennessee, 1 Coldwell, 398, 400–403.
And see Van Zandt vs. Waddel, 2 Yerger, 260.
Yancy vs. Yancy, 5 Heiskell, 353, 357–365.

[*b*]

The second objection is that the act of December 1st, 1869, violates Article XI, section 7, of the Constitution of 1834, which provides:

"The Legislature shall have no power to suspend any general law for the benefit of any particular individual, nor to pass any law for the benefit of individuals inconsistent with the general laws of the land; nor to pass any law granting to any individual or individuals rights, privileges, immunities or exemptions, other than such as may be by the same law extended to any member of the community who may be able to bring himself within the provisions of such law." See same provision in Constitution of 1870, Art. XI, section 8.

And also the act violates sec. 8, Article I, of the Constitution, providing that—

"No man shall be taken or imprisoned, or disseized of his freehold, liberties or privileges, or outlawed, or exiled, or in any manner destroyed, or deprived of his life, liberty or property but by the judgment of his peers or the law of the land."

If, as I have argued, the Ninth and Tenth wards were liable for the debt of the city on the 1st of December, 1869, including Brown's debt, or were liable to taxation for its payment, then the

Legislature could not constitutionally relieve them of such liability, as it attempted to do by the act.

See, on this point:

Jones vs. Perry, 10 Yerger, 59, 71–80.
Morgan vs. Reed, 2 Head, 276, 281–285.
Mayor of Alexandria vs. Dearmon, 2 Sneed, 104.
Budd vs. The State, 3 Humph., 483, 490–492.
State vs. Burnett, 6 Heiskell, 186.

[c]

The third objection to the act of 1869 is, that it violates the principles of taxation as established by the Constitution, which requires (1) the taxation of all property within the taxing district, and the exemption of none, except such as the Constitution expressly declares may be exempted; (2) that all property shall be taxed according to its value, so that taxes shall be equal and uniform; and (3) that no one species of property from which a tax may be collected shall be taxed higher than any other species of property of the same value.

Constitution of 1870, Art. II, sec. 28, copied elsewhere in this brief.

I need refer here only to the case of Taylor vs. Chandler, 9 Heiskell, 349, which I submit is conclusive of the question. It clearly decides that any tax levied upon any part of the property of the city, must be levied upon all the property within the city, or else is in violation of the Constitution, and therefore void.

II.

The second question is, did the Court err in ordering the levy of the tax to make up the deficiency in the original levy for the year 1875, on the property in the city, excluding that on which the front foot assessments for the cost of the Nicolson pavement had been paid, as exempt from such tax?

I contend it did, for the following reasons:

[1]

In the answer or return of the city to the alternative mandamus sued out by Brown on the 22d of March, 1875, the city made the

defense that "When the contract was made for the laying of said pavements by which the aforesaid debts became due to the relator, it was understood and stipulated that the owners of abutting property should pay for the pavement in front of each lot. And many persons paid for such pavement according to the terms of the contract; and when the act recited in relator's petition of March 18, 1873, was passed, it provided that such persons as had paid for the pavement, and held receipts therefor, might be excused or released from paying the tax levied to pay for such pavement. Wherefore respondents say they cannot levy and cannot collect from all persons subject to pay taxes the tax commanded by the writ, and therefore they cannot obey the writ." Record, p. 10.

To this ground of defense Brown demurred, because—

"The Constitution and the law require all taxes to be equal and uniform, and that no one species of property shall be taxed higher or lower than other property of equal value, and prevent the exemption of any property from taxation; and the act of March, 1873, makes no discrimination in favor of any person or class of persons; and hence no account can be taken of the fact that some of those upon whom special assessments were laid to pay for the cost of the pavements laid down paid the assessments levied upon them. The said special assessments were paid voluntarily, and without lawful authority, and constitute no defense to a lawful levy of taxes to pay the said decree. If the parties who have so paid have any equities they are against the city under the said act of 18th of March, 1873, and they are not against the petitioner." Record, p. 11.

As already stated, the Court sustained the demurrer, and ordered and adjudged that the city proceed in the manner therein directed to assess, levy and collect upon *all the property within the city* taxable by law, a tax in addition to all other taxes, etc. Record, p. 12.

This judgment is in force, and the original levy of taxes for the year 1875 to pay in part the decree in favor of Brown was made in pursuance of it. Record, p. 15 and 18.

I insist, therefore, that the question whether the property on which the special assessments for the cost of the pavement were paid was liable to taxation for the payment of Brown's decree, was

not open in March, 1876, when Judge Brown undertook to pass upon and decide it. The Court had settled it in the particular suit, and as the term at which the judgment was rendered had passed, the Court had no power to pronounce a different judgment, and hence the judgment of March, 1876, if not absolutely void, is certainly erroneous.

See the authorities already cited in this brief on the same propositions under the first question.

[2]

If I am wrong in the last position then I insist that for the reasons already stated when referring to the property in the Ninth and Tenth wards, the liability of the property on which the special assessments by the front foot for the cost of the pavement were paid, has been conclusively fixed by the assessment thereof for taxation, and the levy of taxes thereon for the payment of Brown's decree, and the failure of the parties charged to avail themselves of the remedies provided to test the legality of the assessment and tax.

I refer to the authorities already cited on the same proposition on the question as to exempting the property in the Ninth and Tenth wards.

[3]

Supposing the question not settled, the Court can have little difficulty in concluding that the parties who paid the special assessments by the front foot for the cost of the pavement, have not, for that reason, any just claim to exemption from taxation for the payment of Brown's decree.

The act of March 18th, 1873, provided "that where any incorporated town or city had, by virtue of presumed authority to levy special assessments for specific purposes, levied and collected taxes or special assessments, the right to make which levy and assesments was afterwards declared void by the Supreme Court of the State, said town or city should have the power to levy a tax in addition to all other taxes allowed by law to be levied sufficient to cover the entire cost of the improvement, with interest thereon, for which said special assessments were illegally made, and in the levying of such additional tax authority was thereby given to such town or city to allow as valid payments on said additional tax any

sum or sums, with interest, paid by persons in satisfaction or in part satisfaction of said special assessments illegally levied and collected as aforesaid."

Acts of 1873, ch. 67, p. 102.

It will be noticed that the power conferred by the act was to levy a tax "sufficient to cover the *entire cost of the improvement, with interest thereon, for which the special assessments were illegally made.*" It is a matter of history that the act, though general, to meet the requirement of the constitution of 1870, Article XI, Sec. 8, had reference only to Memphis, that being the only city or town in the State in the condition supposed by the act.

The necessity for the legislation arose from the fact that the Supreme Court of the United States had decided that the city was bound to pay the contractors the cost of the pavement, which they had not been able to collect from the property owners, and the only way to raise the sum due was by general taxation.

City of Memphis vs. Brown, 20 Wallace, 290.

The object of conferring the power to levy a tax sufficient to cover *the entire cost* of the improvement, with interest, for which the special assessments were illegally made, was to enable the city to provide, (1) for the payment of the balance due the contractors who had put down the pavement, and who had been cut off by the decision of the Supreme Court of Tennessee—Taylor vs. Chandler, 9 Heiskell, p. 349—from collecting what was due them under their contracts with the city from the property on which the special assessments had been made; and (2) for reimbursing those who had paid the special assessments illegally made upon their property the sums they had thus paid towards the cost of the pavement. If the tax was really sufficient to cover the entire cost, it is plain both the contractors and the persons who had paid the special assessments would be amply provided for. And when the tax was enough to pay *the entire cost*, with interest, there was no injustice or impropriety in providing that the city might allow as valid payments on the tax any sum or sums with interest paid by persons in satisfaction or in part satisfaction of said special assessments, illegally levied and collected, for in that case after crediting all the payments there would still be sufficient left to pay the balances due the contractors.

While the power conferred by the act of March, 1873, extended to the levy and collection of a tax sufficient to pay the entire cost of the improvement, it needs no argument to prove it included the lesser power to levy and collect a tax to pay the cost of any particular part of the improvement less than the whole.

The act being mandatory to the city, at least so far as it concerned private rights, each person occupying the position of a contractor to whom a part of the cost of the improvement was yet due, and each person who had paid a special assessment by the front foot illegally laid for the cost of the pavement, had the right, in case the city refused to pay his demand or levy a tax for the purpose, to compel by mandamus the exercise of the power conferred by the act to levy and collect the tax to the extent necessary to pay what was due him.

Supervisors vs. United States, 4 Wallace, 435.
City of Galena vs. Amy, 5 Wallace, 705.

But such person had no right to compel by mandamus the performance of the general duty "to levy the tax to cover the entire cost of the improvement and interest." All he was entitled to ask for, or that the Court would grant him, was the compulsory levy of a tax, specially set apart for the purpose, sufficient to pay his particular demand.

High on Extraordinary Legal Remedies, secs. 371, 33, 431, etc.
Ex Parte Fleming, 2 Wallace, 759.

The city having failed to pay Brown what was due him under the contracts for laying the pavement, and having failed to levy a tax for the purpose, and he being in a position to ask such relief, he prayed only the levy and collection of a tax to pay the sum he was entitled to, and the Court awarded him a mandamus requiring the levy and collectien of a tax adequate for that purpose, and the levy has been made accordingly.

It is manifest that if the tax so levied can be discharged by payments heretofore made on special assessments for the cost of the pavement, that it will be, or may be, absorbed in that way, and no money will be realized, and Brown will really derive no benefit from the tax he has procured to be levied.

The Legislature could not have intended, and certainly did not in words provide for any such result. It declared in the act of March, 1873, that the city in levying such additional tax was given authority to allow as valid payments on the tax levied any sum or sums, with interest, paid by persons in satisfaction or in part satisfaction of said special assessments illegally levied and collected as aforesaid.

The additional tax which might be so paid, was the tax "to cover the entire cost of the improvement, with interest thereon," authorized by the act.

The tax now under consideration has not been levied to cover the *entire cost* of the pavement, but to pay only the amount due Brown. It is not, therefore, a tax which may, by the permission of the act of March, 1873, be paid, if the city so chooses, by sums paid in satisfaction of the illegal special assessments. Record, p. 12–13, 14, 18.

Besides, by the terms of the act of March, 1873, it was made discretionary with the city to allow the sum or sums paid in satisfaction of the illegal special assessments as payments on the tax to be levied to cover the entire cost of the improvement, or not to do so. The language of the act is: "And *in the levying of such additional tax, authority* is hereby given to such town or city to allow as valid payments on such additional tax, any sum or sums," etc.

There is nothing in the act to prevent the city requiring the tax levied under the act to be paid in money, if it chose to do so; or, to be more accurate, there is nothing in the act compelling the city to receive in payment of the tax any sums paid on account of the illegal assessments.

And by not providing at the time of levying the tax that it might be paid in the "sum or sums paid in satisfaction of the illegal special assessments," the city has, in effect, required that the tax levied to pay Brown's decree be paid in money. Indeed, it could do nothing else, consistently with the mandamus and the judgment on which it issued, as they required the collection of the tax in lawful money. Record, p. 12, 14.

The general law is, that taxes must be paid in money.
Johnson vs. United States, 5 Mason, 425.
United States vs. Morgan, 11 Howard, 154, 159.
Miltenberger vs. Cooke, 18 Wallace, 421.
Cooley on Taxation, p. 12.

And the act amending the charter of Memphis passed on 2d of March, 1870, provided that "thereafter all taxes of every character which might be assessed or become due to the city of Memphis should be paid in gold or silver coin, or other lawful money of the United States, and no warrant, scrip, coupon or other security, nor any indebtedness of the city of Memphis, should be receivable in payment thereof."

Acts 1869–1870, ch. 117, sec. 3 (private acts), p. 632.

The above act has not been repealed, so far as it concerns the tax under consideration.

The act of 23d of March, 1875—Acts of 1875, ch. 92, sec. 66, p. 160—makes only the taxes which accrued prior to 1st of January, 1875, payable in city indebtedness.

As to taxes since that date, it provides: "But all taxes falling due after the 1st day of January, 1875, shall be payable in current funds, or in past-due indebtedness of the city for the current year, in kind, or such as the tax for which it is received might be applied [to the payment of] after collection."

As "no past-due indebtedness of the city for the current year in kind" has been offered in payment of the tax levied to pay Brown's decree, or is shown to exist, and there is no indebtedness of the city, except the indebtedness to Brown, to which the tax when collected might be applied, it is not necessary to notice further the above provision of the act of 1875.

Besides—though up to this point I have assumed the contrary—there is nothing to show that the tax levied to pay the balance due on Brown's decree was levied under the power contained in the act of March, 1873. For anything appearing to the contrary, it may have been levied under some power conferred upon the city by some other law.

And, certainly, as already shown, the terms of the act of March, 1873, have not been observed in making the levy.

One other consideration: The exemption of the property on which the front foot assessments for the cost of the pavement were paid, from liability to taxation to pay the balance due on Brown's decree, is based exclusively on the act of March, 1873.

It has already been seen that the act of March, 1873, was expressly repealed by the act of 23d of March, 1875.

Acts of 1875, ch. 92, sec. 81, p. 167–168.

The tax for the payment of Brown's decree was not levied until the 10th of December, 1875, about nine months after the repeal of the act of March, 1873. Record, p. 18.

The power to repeal the act of March, 1873, to the extent of taking from the city the authority to allow the tax authorized by the act to be levied, to be paid in the sum or sums paid in satisfaction of the special assessments illegally levied and collected will scarcely be denied.

City of Augusta vs. North, 57 Maine 393.

Such repeal merely affected the mode of collecting the tax. And it is well settled that the Legislature has absolute control of remedies, provided it always provides some substantial remedy.

Tribune Association vs. The Mayor, 48 Barbour 240.

Cooley on Constitutional Limitations, p. 287, &c., and p. 361, &c.

I submit, therefore, that the act of March, 1873, affords no grounds on which to base the claim of exemption.

The act of 18th March, 1873, acts of 1873, ch. 67, p. 102, did not, however, assume *to exempt* any property from taxation.

It could not, therefore, afford any justification of Judge Brown's judgment of March, 2, 1876. The act did not refer to any particular class of persons, or to any particular description of property. The privilege it authorized the city in levying the tax to confer was "to allow as valid payments on said additional tax any sum or sums

with interest paid by persons in satisfaction or part satisfaction of said special assessments illegally levied and collected as aforesaid."

It was immaterial who offered the sum or sums paid on the special assessments in payment of the taxes levied under the act, and immaterial upon what property the taxes proposed to be so paid were due. All that was required was that the person offering to make the payment had the right to apply the sums he asked should be received as payments to the purpose. Whether he originally paid the special assessments, or had acquired the right of some one who did pay them, or the property he proposed so to pay the taxes on was property on which the special assessments had been levied and paid, or was property never specially assessed for the cost of the pavement was not of any importance.

If this be a correct exposition of the act, so far from excepting or exempting any particular class of persons or any particular property from the tax it authorized, it necessarily contemplated and required equal and uniform taxation of all taxable property.

The general law is that no set-off is admissible against demands for taxes, as they are not in the nature of contracts between party and party, either express or implied, but are the positive acts of the government through its various agents, binding upon the inhabitants, and to the making and enforcing of which their personal consent individually is not required.

Chisholm vs. Charleston, 3 So. Ca. (N. S.) 394.
McCracken vs. Elden, 34 Penna St. 239.
Pierce vs. Boston, 3 Metc. 520.
Johnson vs. Howard, 41 Vermont 122.
Himmelman vs. Spanagel, 39 California 389.
Waterman on Set-off, sec. 37 p. 41, sec. 153 p. 189.
Shaw vs. Pickett, 26 Vermont 482.
Commonwealth vs. Rodes, 5 Monroe 318.
Wilson vs. Lewistown, 1 Watts & Serg. 428.
East St. Louis vs. Wider, 46 Illinois 351.
Cooley on Taxation, p. 13–14.

A case in California, Fremont vs. Mariposa County, 11 California 361, decides that "equity will not relieve from a tax on the ground that an illegal tax was collected of the plaintiff in former years."

The recent case in the Supreme Court of Tennessee of Lea vs. City of Memphis, MSS. Op., Jackson, April Term, 1877, is conclusive on the same question in this particular case. The bill filed by Lea is in the present record. Record, pages 27–39.

Lea was one of those who paid the assessments made by the front foot for the cost of the pavement. The payments so made by him largely exceeded the taxes levied upon his property for the payment of Brown's decree and reimbursing those who had paid the front foot assessments.

He claimed that the sums so paid by him should be treated as payments made on account of the entire cost of the pavement, and prayed that the city be enjoined from collecting the tax levied to pay Brown's decree as well as the reimbursing tax, except in the evidences Lea held of the payments he had made on the cost of the pavement by the front foot assessments.

The cause was heard on demurrer to the bill.

The Court held (1) that the assessments for the cost of the pavement by the front foot having been illegal and having been voluntarily paid by Lea, he had no right by law, and without some substantive undertaking by the city to pay them to him, to recover the sums paid of the city. (2) But, as the city was liable for the cost of the pavement to the contractor, and the contractor had collected the assessments paid as the agent of the city, and had given the city credit for the amount of them, it was right and lawful for the city to provide for the indemnity of those who had made the payments; and, inasmuch, as under the authority of the act of 18th March, 1873, the city had passed an ordinance assuming to pay the sums so paid, and designating a mode of payment, it had thereby become bound to pay all those who had paid the assessments the sums so paid by them. (3) While, however, the parties making the said payments were entitled to an account of the sums paid by them on account of the assessments and to a decree for the amount due them against the city, that they were not entitled to interfere with the special tax levied under the mandamus from the Circuit Court of the United States to pay Brown's debt, as such interference "would have the effect practically to defeat the execution of the

order of that Court *by diverting the means intended to pay Brown's debt to other purposes.*"

See the certified copy of the opinion furnished the Court.

The Court might well have declined interfering with the collection of the tax levied for Brown's benefit on the ground that it had not jurisdiction to do so. But it chose to put its refusal to interfere on the ground that Lea had no right to ask such interference.

The Constitution of Tennessee provides—

"All property, real, personal or mixed, shall be taxed; but the Legislature may except such as may be held by the State, by counties, cities or towns, and used exclusively for public or corporation purposes, and such as may be held and used for urposes purely religious, charitable, scientific, literary or educational; and shall except one thousand dollars worth of personal property in the hands of each taxpayer, and the direct product of the soil in the hands of the producer and his immediate vendee. All property shall be taxed according to its value, that value to be ascertained in such a manner as the Legislature shall direct, so that taxes shall be equal and uniform throughout the State. No one species of property from which a tax may be collected shall be taxed higher than any other species of property of the same value."

Constitution of 1870, Art. II, Sec. 28.

The next section provides—

"The General Assembly shall have power to authorize the several counties and incorporated towns in this State to impose taxes for county and corporation purposes respectively in such manner as shall be prescribed by law, and all property shall be taxed according to its value upon the principles established in regard to State taxation."

Sec. 29.

Now under such constitutional provisions when a tax is levied it must be imposed equally on all the property within the taxing district, whether that district be the State, a county or a city or town.

Taylor vs. Chandler, 9 Heiskell, 349.

The same doctrine is established in other States having similar constitutions.

Knowlton vs. Supervisors, 9 Wisconsin, p. 410.
Gilman vs. Sheboygan, 2 Black, S. C. R. 510.
Zanesville vs. Richards, 5 Ohio St. 589.
State vs. Merchant's Insurance Co., 12 Louisiana Ann., 802.
Pike vs. the State of Arkansas, 5 Arks. R., p. 204.
And see Blake vs. Loughborough, 5 Wheaton, 317.

It is therefore impossible that a tax can be levied to pay Brown's decree, and the property in the city liable to other taxation on which the assessments illegally made by the front foot for the cost of the pavement have been paid, be exempted from such taxation.

The Legislature recognized this fact in passing the act of March, 1873. If it could lawfully have declared the property on which the assessments had been paid exempt from taxation for the cost of the pavement, it no doubt would have done so. But it could not, and so instead of attempting such a thing, it provided for the levy of a tax to pay the entire cost of the pavement, and for the levy of such tax on *all taxable property*. And in order to equalize those who had paid the assessments by the front foot with those who had made no payments, it provided that the sum or sums so paid might in the discretion of the city be received as payments on the tax so levied. If the city failed to exercise its discretion to receive such former payments in satisfaction of the tax, then those making the payments would be entitled to the proceeds of the tax when collected. It is plain that this system carried out would produce equality.

For the substance of the ordinance passed by the city under the act of March, 1873, see Record p. 17, and for the form of the certificates granted by the city to those who paid the assessments, see Record p. 27.

It is plain also that equality never can be attained by exempting the property, on which the assessments by the front foot have been

paid, from taxation for the balance due by the city to the contractors who laid down the pavement.

Unless it be assumed as certain that the proportion of the cost of the entire pavement which those who paid the assessments by the front foot have paid, is the exact proportion they ought to pay of such cost, on an equal taxation of the whole city to pay the entire cost, and that the balance remaining due Brown and the other contractors from the city for laying the pavement is the exact proportion which those taxpayers ought to pay who have never paid anything on the front foot assessments, it is clear that equality will not be brought about by the exemption.

Now, the Court cannot indulge any such assumption. It cannot possibly be correct in the case of *all* taxpayers, if it be correct in the case of any, which is a fact the Court has no means of ascertaining.

But it must be correct in the case of every taxpayer, or the constitution is violated.

It is hardly necessary to go into the question of fact, but the entire cost of the pavement laid down was about one million, two hundred thousand dollars. Those who paid the front foot assessments paid nearly or quite two-thirds of that sum. The value of the taxable property on which the assessments were laid by the front foot and paid by the owners is about seven millions. The entire taxable property of the city is about twenty millions. And the balance due on Brown's decree is about two hundred and twenty thousand dollars.

These figures are approximately correct.

If it be proper to pay the entire cost of the pavement by taxation of the whole taxable property on the principles of equality, then surely, it is demonstrated the plan of exempting the property on which the assessments have been paid is not the one to bring about that result.

III

The last question is whether the circumstance that Brown made

the affidavit stating the facts on which the judgment he seeks to reverse is based and moved the Court for an alias writ of mandamus commanding the levy of the additional tax necessary, excluding as exempt from taxation the property the judgment directs to be so excluded, precludes him from asking or having a reversal of the judgment?

I admit that, ordinarily, a party who obtains just such a judgment as he asks the Court to render ought not to be heard on a writ of error sued out to reverse it.

But the circumstances of the present case are peculiar and deserve consideration.

Brown had a final decree against the city for a large sum of money, and a judgment awarding a peremptory writ of mandamus compelling the levy and collection of a tax for the year 1875 sufficient to pay him $125,000 of it. The return day of the writ passed before any tax was levied, and finally when the levy was made the city or its officers or agents failed or refused to collect the tax levied upon the property in the Ninth (9th) and Tenth (10th) wards and the property on which the special assessments by the front foot for the cost of the pavement had been laid and paid.

Brown ascertained that the Chancellor of the State Chancery Court had decided that the property in the Ninth and Tenth wards and the property on which the special assessments had been paid were exempt from taxation for the payment of his decree, and that the Judge presiding in the Circuit Court of the United States was of the same opinion.

He had a prospect of getting ultimately out of the levy for 1875, as it then stood, only about one-third the sum he was entitled to for that year.

It was apparent that those who had paid the assessments by the front foot for the cost of the pavement had an equity to an exemption of some sort, or to be reimbursed from some source what they had paid for the benefit of the city; and the property in the Ninth (9th) and Tenth (10th) wards was of so small a value that it was not very important to Brown whether it was or was not

taxed. Under these circumstances, and to avoid trouble and delay in getting his money, if possible, Brown adopted or acquiesced in what he understood to be the decision of the State Chancellor and the opinion of the Judge presiding in the Circuit Court of the United States, and asked an alias writ of mandamus requiring the levy of such additional tax as was necessary in addition to the tax already levied to pay him the sum he was entitled to for the year 1875, and that the property in the Ninth and Tenth wards and the property on which the special assessments by the front foot had been paid be excluded from such levy as exempt from taxation for the payment of his decree.

But here the important fact is to be noticed that Brown's motion was "that the said levy may be made upon the taxable property as assessed and returned for the year 1875, and may not be further postponed." Record, p. 44.

His object is easily to be seen. The judgment of March, 1875, and the writ of mandamus issued upon it, had required that one hundred and twenty-five thousand dollars be levied and collected from the property assessed for taxation for the year 1875, and that the sums collected be paid over to Brown from time to time as collected. Record, p. 12, 14.

The requirement of the judgment and writ could not be complied with except by making the levy of the tax upon the taxable property as assessed and returned for the year 1875. If the levy was so made, and was adequate to pay the balance over and above what would be realized from the original tax levied under the original writ of mandamus, Brown was willing that the levy might be confined to the taxable property other than that in the Ninth and Tenth wards and that on which the assessments by the front foot for the cost of the pavement had been paid, as in that event he would get all he was entitled to.

But the Court declined ordering the levy on the property as assessed and returned for taxation for the year 1875, and instead ordered that the alias writ of mandamus command the city and the Mayor and General Council to proceed, when *they next levied taxes*, to levy in addition to the tax already levied for the payment of Brown's judgment under the requirements of the original writ of

mandamus, a further tax on all the taxable property of the city, excluding the property, etc. Record, p. 45.

This judgment was not rendered till 2d of March, 1876, and necessarily excluded the idea that the levy of the tax was to be made on the property as assessed and returned for taxation for the year 1875, and required the levy to be made on the assessment for the year 1876.

This was not what Brown had desired or asked for, but was a plain infraction of his rights under the judgment of March 30th, 1875, by which he was entitled not only to a tax sufficient to realize him $125,000 out of the property assessed for taxation for the year 1875, but a tax sufficient to realize him a like sum out of the property assessed for taxation for the year 1876. Record, p. 12.

The alias writ thus ordered cast upon the property assessed for taxation for 1876, in addition to the $125,000 placed upon it by the judgment of March 30, 1875, not less than two-thirds of the $125,000 which ought to have been collected from the property assessed for taxation for the year 1875. The effect necessarily would be that Brown would practically get nothing out of the tax for either year, and so he was obliged to decline taking out the alias writ under the judgment and to resort to his writ of error.

I therefore deny that Brown asked for the judgment of March 2d, 1876, and claim that there is no reason why he may not have it reversed, if erroneous, on the present writ of error.

But the facts of the case require that Brown should not be estopped from prosecuting his writ of error, even if the judgment rendered is the precise one he asked. He has no real interest in the question what property is and what property is not exempt from taxation for the payment of his decree, except as the collection of what is due him may be delayed or facilitated by taxing or exempting certain property. He therefore has no such interest in the question as entitles him to consent to any particular settlement of it, or by his conduct to determine that particular classes of property shall or shall not be taxed to pay him. Those from whom the taxes are to be collected are the persons who are concerned in the determination of the questions as to what should be taxed, and as

these are questions settled by the constitution and laws of the State, the Court should determine them according to the constitution and the law, regardless of what Brown has done or has failed to do.

If the property which the judgment of the 2d of March, 1876, has declared exempt from taxation for the payment of Brown's decree, is not really so, those persons whose burdens are increased by the exemption have the undoubted right to make the question, and to be relieved at least to the extent of the illegal increase of the tax upon them.

Cooley on Taxation, p. 153–154.
Gilman vs. Sheboygan, 2 Black, 510.

For each person injured to apply for redress would lead to endless litigation, to immense cost, and to such interruptions of the collection of the tax to pay Brown's decree as would practically defeat its realization altogether.

All this can be avoided *in limine* by settling the questions correctly and finally on this writ of error. And in a case like the present, where the Court assumes, as a means of enforcing one of its judgments, to control the legislative department of the government, or its agents, in the levy and collection of taxes, or, in effect, to collect the taxes itself, the duty is peculiarly incumbent upon it—much more, it seems to me, than in an ordinary suit between private parties—to see that all the provisions of the Constitution and the law applicable are observed.

And I submit the Court should not permit the conduct of either or both parties to the record, to prevent its giving effect to the provisions of the Constitution or law, where those provisions affect or regulate the rights of or are for the benefit or protection of the general public, who are not personally parties before the Court, and are comparatively immaterial to the immediate parties to the record.

Another fact should not be overlooked. At the time Brown filed his affidavit and motion, it was the decision of the Chancery Court of Shelby County that the property on which the assessments by the front foot for the cost of the pavement had been paid,

was exempt from taxation for the payment of Brown's decree. The Circuit Court of the United States adopted the same rule, no doubt in deference to the decision of the Chancery Court, and in order that there might be uniformity. As already shown, the Supreme Court of Tennessee, in the case of Lea vs. the City of Memphis, has adopted a different principle, and has overruled the decision of the Chancery Court. It holds that the property is not exempt, but must be taxed to pay the balance due Brown, and that the parties who paid the assessments for the cost of the pavement must get relief by recovering the money they have paid from the city.

I have already attempted to show the justice and propriety of the decision of the Supreme Court of the State.

The system so adopted by the Supreme Court will necessarily govern as to all taxation not under the immediate control of the Federal Courts.

If the Courts of the United States enforce a different system, that, for instance put forth in the judgment of March, 1876, and exempt the property on which the assessments by the front foot were paid, from taxation, then inextricable confusion will follow, and it will be impossible for the city or any Court ever to adjust the equities of the various parties interested. Such a thing as equalizing the sums the various parties liable paid, or ought to pay, will be utterly out of the question.

And besides, by the original judgment of March 30, 1875, all the property in the city was to be taxed, and the levy has been made accordingly, not regarding the exemptions declared in the judgment of March 2, 1876.

The judgment and levy must stand, and if the judgment of March 2, 1876, stands, then we have the Court, in the same suit, collecting taxes by two different and inconsistent rules.

If everything else were out of the way, I submit the judgment of the 2d of March, 1876, ought to be reversed merely because it conflicts with the decision of the Supreme Court of Tennessee in Lea vs. The City of Memphis. I understand this Court

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The judgment and levy must stand, and if the judgment of March 2, 1876, stands, then we have the Court, in the same suit, collecting taxes by two different and inconsistent rules.

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to act, in cases like the present, substantially upon such a principle.

State Railroad Tax Cases, 92 U. S. (2 Otto), 575, 617–618.

Again, I have already attempted to show that the judgment of March 30, 1875, settled the questions Judge Brown attempted to decide by his judgment of March 2, 1876, and consequently that the Circuit Court, in March, 1876, was without jurisdiction to declare the property in the Ninth and Tenth wards and the property on which the assessments by the front foot to pay the cost of the pavement had been paid exempt from taxation to pay Brown's decree.

See the authorities already cited.

No principle is better settled in the Courts of the United States than that consent of parties cannot confer jurisdiction on the Court.

Cooley's Constitutional Limitations, p. 398, etc.

Montgomery vs. Anderson, 21 Howard, 386.

Ballance vs. Forsyth, 21 Howard, 389.

And a well settled exception to the rule that a party cannot reverse a judgment he has asked for, is that he can do so "when the Court rendering the judgment has no jurisdiction of the person of the defendant, or of the subject-matter; in which case, the judgment being void, the plaintiff must get clear of it in order to proceed anew."

Officer vs. Price, 5 Yerger, 285–286.

Capron vs. Van Noorden, 2 Cranch, 126, is a case in point.

And see Mordecai vs. Lindsay, 19 Howard, 199.

For this reason, then, namely, the Court in March, 1876, had no jurisdiction to render the judgment it undertook to render, Brown may have that judgment reversed under a writ of error.

WM. M. RANDOLPH,

Of Counsel for T. E. Brown.

IN THE

Supreme Court of the United States.

T. E. Brown, Plaintiff in Error,
vs.
The City of Memphis, Defendant in Error.
} No. 778.

Brief & Argument of S. P. Walker and Humes & Poston,

Of Counsel for Defendant in Error.

The questions are, can a citizen or his property be made to pay, *a second time*, his part of a tax to meet the expenses of a public improvement, although he had paid it voluntarily the first time, waiving the unconstitutionality of the mode in which it was then imposed, and although he took the contractor's receipt for the payment, and had it credited on the contractor's claim against the city.

Secondly. When the Legislature, on ascertaining the unconstitutionality and consequent inefficacy of the first mode of raising a tax to meet the cost of such public improvement, prescribes another by statute, and, in it, provides that those tax-payers, who paid under the former act, shall not be required to pay the second time, can a Court enforcing the latter act disregard this provision in favor of those who paid voluntarily under the first act and make them pay a second time in money? The questions arise upon a petition for mandamus of the plaintiff in error to compel the City of Memphis to levy a sufficient tax to pay the judgment of Brown in the Circuit Court of the United States

against the Cit for the unpaid balance of his claim for making certain street improvements.

See the petition, pages 4 to 7.

Also alternative writ, pages 7 to 8.

The fifth ground of City's return opposing the mandamus is as follows: "When the contract was made for laying the pavements by which the debt was created, it was stipulated, according to the statute then in force, that the abutting lot-owners should pay for the pavement in front of each lot; that many persons so paid; and when the latter Act of March 18th, 1873, provided that persons, who had paid their part of the cost of the pavement under the former act, should be released from the burden under the latter act, wherefore the City could not levy and collect from them."

See 5th ground of City's return, p. 10.

Brown's demurrer to this ground is as follows: "The Constitution and laws require taxes to be levied on the principle of equality and uniformity, and that no one species of property shall be taxed higher than any other; and, hence, no account can be taken of the fact, that some of those upon whom the front-foot assessments were made under the first act had voluntarily paid them; such payments were voluntary, without lawful authority, and constitute no defence to the levy under the second act. If the parties paying have any equity, it is against the City under the Act of 1873, March 18th, and not against Brown."

See 5th ground of demurrer, p. 11.

The Court sustained the demurrer to this return and entered an order, declaring the return showed no sufficient ground for not making the levy *on all taxable property.*

See p. 12.

It is evident, as no reference is made in the order to this 5th ground, that the Court treated it as not meeting the command of the writ *to levy the tax on the taxable property.*

No command had issued to levy this tax a second time on those who had already paid, but to levy it on the taxable property. Therefore, this matter could not be set up effectually in this way.

See the order,-p. 12.

Also the peremptory writ, pp. 13, 14.

The peremptory writ ordered the City to levy a tax for 1875, 1876, and 1877, on the taxable property, sufficient to realize $125,000 each year for 1875 and 1876, and as much for 1877 as would pay the balance of the debt.

See p. 14.

On the 9th day of February, 1876, the city made a return to the peremptory writ, declaring its readiness to obey the writ, and that it was then obeying the writ, but to evoke the judgment of the Court for its own guidance in levying this tax, and that it might understand its powers and duties in this matter, proceeds to submit to the Court, among others, the following facts :

See from the word "*respondents*," beginning the last paragraph on page 16, to the word "*premises*," ending the 6th paragraph on page 18.

Exhibit F to the City's return contains a full history of the original contracts, and first statute laying the cost of the pavement on abutting lot-owners; the voluntary payments by many to the contractors, Brown & Co.; then the resistance by many; the decision of the Supreme Court declaring the mode by special assessment on the abutting lots void, as being unconstitutional; then passage of the Act of 1873, March 16, authorizing the costs to be collected by general tax, but releasing those who had voluntarily paid from a second payment under the latter Act of 1873.

See Record, from p. 28 to 39.

Act of 1873 is at p. 33.

The plaintiff, Brown, moved to strike this return from the files.

See p. 39 to 41.

At the same time Brown filed an affidavit and motion, setting forth, among other thing, the following facts.

See from the word "*included*," beginning paragraph 6th on page 42, to the words "*in my favor*," ending paragraph 3d on page 43.

The prayer of this affidavit and motion is in the following words: "That the City be commanded to make a fur- "ther and additional levy of taxes on all the taxable prop- "erty of the city, excluding the property aforesaid on "which the said special assessment for the Nicholson pave- "ment costs were so paid as exempt from such taxation, "as shall be sufficient to pay the entire sum of $125,900 "for the year 1875."

See pp. 43, 44.

The motion to strike out the return of the City, and to grant the relief just quoted from the affidavit, were heard and disposed of the same day, March 2nd, 1876. The return was stricken out, but the Court adjudged that the property on which the owners had paid the special front-foot assessments under the first Act of November, 1866, was not liable to be again taxed to pay this judgment.

See Record, pp. 44, 45.

This writ of error is prosecuted by Brown to review that judgment.

We insist that, as the decision of the Supreme Court of the State declared the Act of November, 1866, void, on the ground that in imposing the cost of the improvement on abutting lots according to frontage, it violated the rules of uniformity and equality of taxation prescribed in section 28, article 2, of the Constitution; and as those who paid under said act had the right to, and did, waive the benefit of this constitutional provision by a voluntary payment, therefore this voluntary payment and consequent waiver of the illegality of the first act made that act, as between the persons so paying and the City, and the contractor, Brown, a legal, binding, and valid act.

Taylor vs. Chandler, 9 Heiskell R., p. 349.

Hence the payment was valid, and operated as an effectual and final discharge of the person so paying from his portion of the cost of the improvement.

Cooley's Con. Lim., p. 187.

To pay is to extinguish, to satisfy, to discharge; one payment forever bars a second claim for payment, and, therefore, these persons cannot be compelled to pay a second time. The affidavit of Brown, the bill, Exhibit F to the City's return, both allege and prove that these accounts against abutting lot-owners were, under the statute and contract, made out by the City Engineer, passed to the contractor, Brown, and then paid directly to Brown by the abutting lot-owners; then Brown gave such owner a receipt in full and credited the amount so paid on the City's debt to him, *as a payment:* and this was treated, acknowledged, and accepted as a payment in adjusting the final balance due Brown when he got his decree for $292,133.72.

Upon elementary principles of common law and common honesty how can these persons be required to pay again?

In the case of Rees vs. Watertown, 19 Wall., at page 119, this Court said: "In seeking to obtain for the plaintiff "his just rights, we must be careful not to invade the rights "of others. If an inhabitant of the City of Watertown "should own a block of buildings of the value of $20,000, "upon no principle of law could the whole of the plaintiff's "debt be collected from that property upon the assumption "that individual property is liable for the payment of cor- "porate debts of the municipality, *it is only so liable for its pro- "portionate amount.* The inhabitants are not joint and sev- "eral debtors with the corporation, nor does their property "stand in that relation to the corporation or the creditor. "This is not the theory of law even in regard to taxation. "The block of buildings we have supposed is liable to tax- "ation only upon its value in proportion to the value of the "entire property to be ascertained by assessment, *and when "the proportion is ascertained and paid, it is no longer or further*

"*liable. It is discharged. The residue of the tax is to be ob-*
"*tained from other sources.* There may be repeated taxes
"and assessments to make up delinquencies, but the princi-
"ple and general rule of law are as we have stated."

But again, section 28 of article 2d of the Constitution of Tennessee of 1870, requires all taxation to be uniform and equal, and that no one species of property shall be taxed higher than another.

Thompson & Steger's Statutes of Tennessee, vol. 1st, p. 19.

To require those persons and their property to pay this tax the second time would violate this constitutional rule of uniformity and equality. The tax was not declared illegal by the Supreme Court, because of any illegality in the purpose, or the improvement, or the contract, or in the imposition of this burden on this property; but because it was done according to the front foot, and limited to the abutting lots, and not uniformly and equally imposed on all the taxable property in the City according to value. The persons paying waived this want of uniformity and equality, and its not being according to value, and paid their parts of this tax. This made the act valid and binding as to them, and made the tax legal. They waived the illegality of the mode of imposition and paid it; then, unquestionably, because others would not waive these objections to the mode, but required the tax to be imposed according to the constitutional mode, the tax can't be imposed again on those who paid. This would be making the mere mode control the substance. The rules of uniformity, equality, and value in the Constitution, were intended to produce *equality of burden, according to value, on all*, and not the vain ceremony of a uniform mode. The man who has paid says: "I have paid "this identical tax once, I ought not to be made to pay it "again." The counsel of Mr. Brown replies: "Yes, but "you paid it under an act that did not pursue the rules of "uniformity in its mode." "Nevertheless," rejoins the other, "I paid it, and the rules of uniformity are for my

"protection, and not to secure a mere uniformity of mode; "these rules would be defeated by making me pay twice; "but if those who did not pay under the illegal act are now "made to pay, equalization of the burden and uniformity "will be secured."

A striking illustration of the rule we are contending for will be found in the following case:

7 Pickering (Mass.) R., 18, Nelson vs. Inhabitants of Milford.

On March 1st, 1819, plaintiff and others were chosen assessors of the Town of Milford. On September 21st the assessors committed the tax-list, with their warrant for the collection of the same, to the town collector of taxes. The taxes were collected, payments being in some cases voluntary, and in others forced by distress. One of the tax-payers, who had paid under pressure of distress, sued the assessors to recover the sum paid by him. He recovered upon the ground that the assessment was irregular. Two other suits were brought against them for the same cause, and, in order to settle those suits and prevent others, the assessors, in equal proportions, refunded the several sums paid under distress. At a town-meeting, held November 1st, 1824, the inhabitants voted to raise the sum which had been assessed in 1819, together with interest thereon, in lieu of the taxes for that year, *the assessment of which had been adjudged illegal*, and to authorize the collector to receive receipts for the payment of the former tax, with the interest thereon, from such persons as had voluntarily paid the same, in discharge of the new tax; and authorized the reimbursement to the assessors of the sums refunded by them to tax-payers. It was held that the reassessment of the whole amount of the taxes illegally assessed, and the authority to receive in payment of the reassessed tax the receipts of those who had voluntarily paid the former assessments, "would operate as a just reassessment and collection of the former taxes, so as to equalize the same on all the inhabitants."

Finally, the Act of 1873, ch. 67, p. 102, (on the provisions of which Brown expressly based his petition for mandamus, (p. 5 of the Record,) and the only authority to the City to levy the tax sought in addition to the $1.60 already levied,) expressly requires that in payment of any tax levied under its provisions those tax-payers who had voluntarily paid the special assessment under the illegal act should be credited with the amount so paid; in other words, should not pay the tax again.

The Act of March 18, 1873, ch. 67, is in the following words:

"*Be it enacted by the General Assembly of the State of Ten-*
"*nessee*, That where any incorporated town or city has, by
"virtue of presumed authority to lay special assessments
"for specific purposes, levied and collected taxes or special
"assessments, the right to make which levy and assessment
"was afterwards declared void by the Supreme Court of
"the State, said town or city shall have the power to levy
"a tax in addition to all other taxes allowed by law to be
"levied, sufficient to cover the entire cost of the improve-
"ment, with interest thereon, for which said special assess-
"ments were illegally made, and in the levying of such ad-
"ditional tax, authority is hereby given to such town or city
"to allow as valid payments on said additional tax any sum
"or sums, with interest, paid by persons in satisfaction or
"in part satisfaction of said special assessments, illegally
"levied and collected as aforesaid."

Here the authority to levy the tax is expressly coupled with a like authority "in levying such additional tax *to allow* "*as valid payments on said additional tax any sum or sums*, "*with interest, paid by persons in satisfaction or in part satis-*"*faction of said special assessments*, illegally levied and col-"lected as aforesaid."

True, both the power to levy the tax and that to allow the payments are couched in words granting an authority, but as these powers are clearly legal duties of the City, they will be construed as mandatory and not merely as directory.

And still more clearly, the Court will not construe the authority to levy the tax as mandatory, and at the same time deny the authority to allow the previous payments, although expressed in the same words.

Indeed, this duty and power, vested by this act in the City to allow these payments, are but the declaration of the rights of the parties (who made the voluntary payments), according to the principles of the common law, that a payment is a satisfaction; and of the Constitution of Tennessee requiring taxation to be uniform, equal, and ad valorem on all alike.

This order of March 2d, 1876, at pp. 44, 45, exempting those who had paid voluntarily under the former act, was procured by Brown himself, with a further order for the levy of an additional tax on all other taxable property to make up the deficiency caused by these exemptions.

We submit, therefore, that even if erroneous, the order will not be reversed; upon the principle well settled in this Court, that the plaintiff in error cannot complain here of an error committed by the court below, if that error was produced by his request.

As to the liability of the property of the 9th and 10th wards, we say:

By an act of the Legislature of the 3d of December, 1867, (printed on pages 65, 66, of the published Acts of 1867 and 1868,) certain new territory was added to the corporate limits of the City, and designated as the 9th and 10th wards.

By an act of the 1st of December, 1869, it was enacted that "the people residing within the limits of the addition made to the City of Memphis by the Acts of 1867 (meaning the above referred to) shall not be taxed to pay any part of the debt of the City or interest thereon contracted prior to the passage of said Act of 1867.."

In the months of March and July, 1867, the City of Memphis entered into contracts with Forrest, Mitchell & Co., and Taylor, McBean & Co., by which the latter under-

took to pave certain streets of the City with the "*Nicholson pavement.*"

See Exhibit B to the petition.

The other contracts, in all respects material to this question, were similar to the one exhibited. Under these contracts many of the streets were paved. Some portions of this paving was done before, but much the greater portion was done after the passage of said act of December, 1867. The original paving contracts made with Forrest, Mitchell & Co., and Taylor, McBean & Co., were, on June 2d, 1868, transferred to Brown & Co.; it was made with the consent of the City; and T. E. Brown & Co. gave bond to secure the faithful performance of the contracts.

See Exhibit "C."

We insist, the debt of Brown & Co. was contracted within the meaning of the Act of 1869, prior to the admission of said territory.

We also insist, that as the order exempting this property was procured in the Court below by Brown himself, he cannot complain of it in this Court.

We think that we need not cite authorities to the proposition that the Legislature in adding the new territory had power to say whether, and to what extent, such territory should be liable for debts antecedently contracted.

HUMES & POSTON,
S. P. WALKER,
Of Counsel for Defendant in Error.

Brown

IN THE

Supreme Court of the United States.

The United States
ON THE RELATION OF
Talmadge E. Brown,
Plaintiff in Error,
vs.
The City of Memphis
AND OTHERS,
Defendants in Error.

No. 778.

BRIEF

... Court not be *res-adjudicata*.

Rees vs. The City of Watertown, 19 Wallace, 107–123.
Memphis vs. Brown, 4 Otto, 715–718.

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The idea in Mr. Randolph's brief that the inhabitants of the 9th and 10th Wards of the city, and the tax payers of Memphis generally who had paid up the Nicholson pavement tax, were precluded by the decree of March, 1875, to make further defense, is unfounded.

First. The decree was entirely between Brown, the creditor, and the City of Memphis, the tax payers of the 9th and 10th Wards, and the tax payers who had already paid their taxes—not being parties—and therefore, they were not bound by the decree. As to all such persons the decree could not be *res-ajudicata.*

Rees vs. The City of Watertown, 19 Wallace, 107–123.
Memphis vs. Brown, 4 Otto, 715–718.

Second. By the very terms of the decree they were not precluded. The language of the decree was *general*—namely, to levy and collect the tax upon all the property within the city *taxable by law.* This left the question open as to the property *taxable by law. No particular property or class of property was named. It was not decided that the property of the 9th and 10th Wards were liable, nor that the tax payers who had paid should pay again.* And, of course, when the attempt was made by Brown, the creditor, to reach these wards, or these tax payers, they could show they were not liable.

Buck vs. Colbath, 3 Wallace, 335, 19 Wallace, 107–120–122–123, 4 Otto, 717.

Third. The tax payers of the 9th and 10th Wards, and the tax payers who had paid, did not become parties till March, 1876, when the court below decreed they were not liable.

Now we maintain that the property of the 9th and 10th Wards of the city, and the tax payers generally who had paid the tax, are not liable to be taxed to pay this debt—because:

1. Brown, the creditor, in his petition for the mandamus, expressly stated that these wards and these tax payers were not liable, and he prayed that they be excluded from the tax. And it was in pursuance of this very statement and of this prayer that the judge below decided they were not liable. No doubt, his opinion too was based upon his deliberate conviction of the law. The application for a mandamus, in whatever shape made, must state a good title and a proper case, for it is in the nature of a declaration.

Per Strong, judge, People vs. Ransom, 2 Coms. 490.

Again, the relator must set forth his title, or the facts on which he claims relief.

10 Wend, 25.

So is Cowen's opinion in People vs. Collins, 19 Wend, 56.

So is the People vs. Supervisors of West Chester, 15 Barbour, 408.

Now we cannot possibly see how Brown, the creditor, can claim the reversal of a decree thus had, at his own instance and upon his own prayer, and the more especially so when it is seen that there must be a pleading, a declaration in a mandamus case as well as in any other suit, and that, of course, the judgment or decree cannot

go beyond the *allegata*. An appeal or writ of error cannot, as we suppose, be taken by a party who *consents* to the decree. And what is the difference between one who consents and one who asks for the decree? It is decided that to entitle the plaintiff to the reversal of a judgment refusing a peremptory mandamus, the record must show that the alternative mandamus was, upon its face, sufficient to entitle the relator to the relief sought.

Commercial Bank vs. Canal Commissioners, 10 Wend, 25.
People vs. President of Brooklin, 13 Wend, 130.

And a court of appellate jurisdiction cannot reverse a judgment of non-suit produced by the *voluntary act* of the plaintiff.

Von Wermer vs. Mayor of Albany, 18 Wend, 169.

And in O'Dougherty vs. Aldrich, 5 Den.. 385, the court refused to non-suit on the defendant's motion, and afterwards non-suited the plaintiff, at his own request. Held that a writ of error could not be maintained.

But if the petition and prayer of the creditor allowed the questions to be open:

2. The property of the 9th and 10th Wards are not liable to pay this tax; nor are the tax payers who submitted to the law and paid up their taxes. And first, as to those who paid their taxes, it is conceded that the Supreme Court of Tennessee, in Taylor, McBean & Co. vs. Chandler et al., 9 Heiskell, 349, finally held the law under which the Nicholson pavement tax was levied to be unconstitutional and void. But in the meantime, many of the tax payers of the city had submitted to the law, and complied with its terms by paying up their taxes—Brown, the creditor, himself being the collector upon tax bills furnished him by the city. Can those who thus paid be taxed again for this very same tax? And can any other law be legally passed to make them pay again? We say clearly not. A party aggrieved by an unconstitutional law may submit to it and comply with its terms, and no one else can complain.

In Dejarnett vs. Haynes, 1 Cushman, 600, it is held that no one but the party (or a person claiming under him) whose right is affected by an act of the Legislature can plead its unconstitutionality.

So is Coleman vs. Carr, Walker, 258.

And so is Harmon vs. Barstow, 1 Cushman, 276.

In this last case it is held "and so a purchaser of a judgment "sold for costs cannot object to a bill by the owner to redeem and "to recover from the purchaser the money he has collected under "it, that the statute authorizing the sale is unconstitutional." "And the doctrines of the case of McGinnis vs. The State, 9 Hum., 43–55, are conclusive to show that Brown, the creditor in this case, is estopped, to deny that these tax payers have paid their part of this debt. The same doctrines are to be found in Cooley's Con. Lim., pp. 181–182, and cases cited. Then the tax payers who thus paid were completely discharged by the payment. They had a perfect defense against any further payment. Could any law be afterwards passed, such as the Act of 1873, or any other act, if to be so construed, that would restore the liability or cause the tax payers to be again liable to pay taxes on this debt? We say, clearly not. Any such statute would be unconstitutional.

Girdner, et al. vs. Stephens, 1 Heiskell, 280, and cases cited, and especially Cooley on Lim., p. 369.

As to the 9th and 10th Wards, the territories composing them were only added to the city on the 3d of December, 1867. Acts of Tennessee, 1867–1868—private acts, pp. 65–66. Before this, the *contracts* on which Brown's judgment is based had been made. See the contracts in the City of Memphis vs. Brown, 20 Wallace, pp. 293 and 294. The *contracts* were certainly made before the annexation, and *at once became a debt.* 20 Wallace, 320–321. On the 1st of December, 1869, a new and full Charter for the City of Memphis was made, and all other charters repealed. Acts of Tennessee, 1869–1870, ch. 26, pp. 225 to 245. That this was an out and out new charter, the beginning, so to speak, of a new government, will appear from the complete terms of the charter, and from the repeal at Sec. 78, p. 248.

In Section 2, p. 226 of this charter, it is declared "that the "people residing within the limits of the addition made to the City "of Memphis by the acts of 1867, shall not be taxed to pay any "part of the debt of the city, or interest thereon, *contracted* prior "to the passage of said act of 1867."

The same thing is in Section 68 of the Acts of 1875. Acts of Tennessee, 1875, ch. 92, p. 161. We suppose such legislation as this to be perfectly within the power of the Legislature. 1 Dillon on Municipal Corporations, Sections 36 and 37. Certainly, in the

original act of annexation, this could have been done. No one can doubt this. And if then, why not afterwards, even with the same charter, and a *fortiori* with a new charter, virtually making a new government? The propriety and justice of such a law cannot be doubted. It would be very unjust to annex new territory where the people had had no protection from the City Government, and no voice in the election of its officers, and tax them for its past indebtedness. No greater tyrany can exist than to tax a people to pay a debt they never made, and had no voice in making. Cooley on Lim., 24. It may be doubted whether the people of this newly added territory could be made liable for the old debt of the city. In Indiana, it has been decided that where the boundaries of a township have been extended, *after it had voted aid to a work of internal improvement*, the territory brought in cannot be subjected to the tax so voted. Alvis vs. Whitney, 43 Ind., 83. But surely, if by some oversight a clause to save the new people from the old debt in which they had no hand, and for which they had received no protection, should be omitted, the gross injustice might be corrected by the Legislature. And this, even under the old charter and a *fortiori* if the old government were abolished, and a new one formed. It is a rule that laws will be so construed, if possible, as not to impose debts or taxes without the consent of the people taxed, or their immediate representatives. Keesy vs. Bricker, 60 Penn. State Rep., 9.

The case of Knowlton vs. Supervisors of Rock County, 9 Wis., 410, 421, is, perhaps, the only one in our way, and that is not law. And even that case had none of the equities of our case, and can hardly be said to be an authority against us. Mr. Cooley, in his work on taxation, pp. 118, 119 and 120, notices this case, and disapproves it, and cited numerous cases to the contrary.

Serrill vs. Philadelphia, 38 Penn. St. Rep., 354-358.
Gillett vs. Hertford, 31 Conn., 351.
Henderson vs. Lambert, 8 Bush, 607.
Benoist vs. St. Louis, 19 Mo., 179.
Lee vs. Thomas, 49 Mo., 112.
Zanesville vs. Richards, 5 Ohio, N. S. 589.

And we think, upon reason and authority, these wards cannot be taxed for this debt.

3. The point in Mr. Randolph's brief that the remedy of the tax payers of the 9th and 10th Wards, and of those who had paid their taxes was by appeal to the assessors, is a fallacy. This may do as to mere errors in the assessment, and the like. But when the objection is to the foundation of the tax, as where a tax once paid is demanded again, or where property which by law is exempt from taxation is assessed, the proper resort is to the courts. Cooley on Taxation, pp. 541–553. The very case cited by Mr. Randolph, County Court of Obion vs. Marr, 8 Hum., 634–638, is against him on this point. The idea of a pre-payment of taxes, and then the suit afterwards has no application, as a common thing, to Municipal taxes. 2 Otto, 615. It has none in Tennessee. The rule laid down in the State Railroad Tax cases, 2 Otto, 575–618, in Tennessee, only applies to State taxes, and has no application to the taxes of a city. So expressly is the Act of the 20th of March, 1873. Act of 1873, ch. 44, pp. 71–73.

4. The taxes sought to be imposed upon the 9th and 10th Wards, and upon the taxpayers who had paid, being illegal, their remedy by petition in the nature of the *audita querela*, and now even by motion, is simple. The mandamus as here used is simply an execution, and if it takes things not subject to it, the remedy is simple and easy.

2 Abbott's National Digest, 485–486.
5 " " " 394–395.
4 Johnson's Rep., 191.
4 Duer, 148.
1 Abbott's National Dig., 215.
1 King's Dig., 238–239.
6 Wallace, 189–200.

It can only take what is subject to it by State law. 2 Abbott's National Dig., 471 to 477–482–483. Desty's Federal Proceedure, Sec. 916.

WRIGHT & FOLKES,

For the 9th and 10th Wards, and the Taxpayers who had paid.